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**The Standing of Victims
in the Procedural Design
of
the International Criminal Court**

Thesis submitted to Middlesex University in partial
fulfilment of the requirements for the degree of
Doctor of Philosophy

Tatyana Emilova Bachvarova

School of Law
Middlesex University

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Abstract

The thesis explores the autonomous standing of victims in the proceedings and in the evidentiary process before the International Criminal Court ('the ICC'). For the purpose of elucidating the part played by victims as protagonists in their own right, the thesis brings forth a number of core characteristics that delimit the status of victims and distinguish it, accordingly, from the standing of the parties and from other non-party participants.

Chapter I illuminates the eligibility of a person as a victim pursuant to rule 85 of the Rules of Procedure and Evidence as the starting point for any involvement of victims in the course of the proceedings. The thesis explores the multifaceted matters ensuing from the application and interpretation of this provision as a whole, as well as of each of the eligibility criteria. An important highlight into the independent yet non-party standing of victims within the ICC's procedural design is provided in Chapter II by way of a comprehensive and innovative categorization of the array of rights afforded to victims by the normative framework. Chapter III embarks on a thorough analysis of the nature and the confines of the core right of victims to participate in the criminal justice process and the manifold issues ensuing from each of the prerequisites of article 68(3) of the Rome Statute. The intriguing phenomenon of duality of victim-witness status is contemplated in Chapter IV in light of the overarching principles and fundamental concepts in the realm of evidence law. The part played by victims in the evidentiary process on the merits of the criminal case, as well as in reparation proceedings is elucidated in Chapter V against the backdrop of the overall rationale of the ICC's fact-finding mechanism, including the respective roles of the parties and of the Chamber. The thesis lends support to the conclusion that the standing and the part accorded to victims throughout the ICC's process ensue from the purpose of their participation, as well as from the objective and subject-matter of the proceedings at hand.

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INTRODUCTION

Whenever the issue of victims and international criminal justice comes to the fore it is commonplace to portray the victims' standing designed by the drafters of the International Criminal Court ('the ICC'; 'the Court') as an unprecedented phenomenon in the international realm. Indeed, on the plane of international criminal justice the Rome Statute ('the Statute') introduces the first codification of the right of victims to participate in criminal proceedings in their own right, *i.e.* in their capacity as victims.¹ As such, the permanent international criminal court is the first forum for the participation of victims of the most heinous crimes of concern to the international community in a capacity, separate and distinct from that of witnesses.² The ICC is also the first criminal justice body at the international horizon empowered to adjudge claims for reparations for the harm sustained by victims as a result of the commission of crimes under the Court's jurisdiction. In this respect, it is essential to note that participation in proceedings adjudicating the individual criminal responsibility of the alleged offender(s) and participation in reparation proceedings following conviction are two separate and distinct possibilities accorded to victims at the ICC that may be employed independently of one another.³

¹ In the same vein, it has been observed that '[a] victim's primary status is that of a person who has suffered; he may also have the secondary status of a person who has seen or heard things. The one does not exclude the other, but the injury suffered is enough in itself to justify the entitlement of such a person to express his concerns and complaints to the Court.' – see Claude Jorda and Jérôme de Hemptinne, 'The Status and Role of the Victim' in Antonio Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. II, Oxford University Press, 2002, pp. 1387-1419, p. 1397, citing Elisabeth Guigou, Address of the French Ministry of Justice at the International Colloquium on 'L'Acces des victimes á la Cour pénale internationale', 27 April 1999.

² Victim-participants at the ICC are also referred to by some commentators as 'courtroom participants' – see Eric Stover, Mychelle Balthazard and K. Alexa Koenig, 'Confronting Duch: civil party participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia', *International Review of the Red Cross*, vol. 93 No. 882 (June 2011), pp. 503-546, p. 513.

³ The independent character of proceedings on the merits and reparation proceedings has also been endorsed in the Court's jurisprudence. See *e.g.* the recent jurisprudence of the Appeals Chamber in the case of the *Prosecutor v. Thomas Lubanga Dyilo (Lubanga)*, where it is observed that 'a request for reparations pursuant to rule 94 of the Rules of Procedure and Evidence is not dependent upon either the filing of an application for participation pursuant to rule 89 of the Rules of Procedure and Evidence or being granted the right to participate in the proceedings in relation to the accused person's guilt or innocence or the sentence.' See the Decision on the admissibility of the appeals against Trial Chamber I's "Decision establishing the principles and procedures to be applied to reparations" and directions on the further conduct of proceedings, ICC-01/04-01/06-2953, 14 December 2012 (*Lubanga*, Decision of the Appeals Chamber of 14 December 2012), para. 69. The Extraordinary Chambers in the Courts of Cambodia have made similar observations. See *The Prosecutor v. KAIN Guek Eav alias Duch*, Case File/Dossier No. 001/18-07-2007-ECCC/SC (ECCC, Case 001), Trial Chamber, Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, 9 October 2009 (ECCC, Case 001, TC, Decision of 9 October

The participation as a victim in proceedings before the Court represents a novel phenomenon which reflects the aspiration of the international community towards the recognition of the victim as an autonomous protagonist on the international criminal justice scene. Viewed in a historical context, the standing of victims in proceedings in their own right is unfamiliar to the predecessors of the first permanent international criminal jurisdiction – the post-World War II tribunals in Nuremberg and Tokyo and the more recent *ad hoc* tribunals for the former Yugoslavia (‘the ICTY’) and Rwanda (‘the ICTR’). At the trials taking place in Nuremberg and Tokyo due to a variety of reasons, not least because most victims had perished or had fled to other continents, the tribunals heard the voices of the perpetrators and not of the victims.⁴ Subsequently, the first criminal justice forum that afforded Holocaust victims the possibility to share their experience with the world was the Eichmann trial.⁵ Therefore, the Eichmann proceedings are widely acknowledged as having launched an ‘era of testimony’ for victims of mass atrocities⁶ that marks to a great extent also the ICTY’s and ICTR’s proceedings.

Although the *ad hoc* tribunals are commended as ‘bringing a sense of justice’ to victims,⁷ still, the lack of a role beyond that of witnesses is perceived as ‘objectifying’ victims and turning them into mere instruments for securing convictions.⁸ At the same time, in comparison to the virtually non-existent victims in the courtroom before the Nuremberg and Tokyo tribunals, the gradual appearance of the victims as witnesses before the ICTY and the ICTR represents a step forward towards the introduction of the victim as a protagonist at the international arena adjudicating mass atrocity crimes. Hence, by allowing some form of involvement in proceedings (albeit confined to their appearance as witnesses)⁹ the *ad hoc* tribunals ‘paved the way for the inclusion of victims in the narrative’.¹⁰

2009), para. 38: ‘a civil action is not a prerequisite for victim participation in criminal proceedings before the ICC.’

⁴ See Susanne Karstedt, ‘From Absence to Presence, From Silence to Voice: Victims in International and Transitional Justice Since the Nuremberg Trials’, *International Review of Victimology*, vol. 17: 9 (2010), pp. 9-30, at p. 13.

⁵ See Stover *et al.*, *supra* note 2, p. 510.

⁶ *Ibid.*

⁷ See Karstedt, *supra* note 4, p. 21.

⁸ See Stover *et al.*, *supra* note 2, pp. 513-514.

⁹ See further Gerard J. Mekjian and Mathew C. Varughese, ‘Hearing the Victim’s Voice: Analysis of Victims’ Advocate Participation in the Trial Proceedings of the International Criminal Court’, *Pace International Law Review*, vol. 17, Issue 1 (Spring 2005), pp. 1-46, p. 15, footnote 52, where the authors suggest that the ICTR afforded victims a greater inclusion through different levels of *quasi*-participation, that is, participation in an

The progressive apparition of the victim at the international horizon has reached its peak in the recognition of the latter as an independent stakeholder in proceedings taking place at the ICC. The autonomous place and role accorded to victims by the Court's founders are thus among the most salient features that differentiate the ICC both from its immediate and from its more remote predecessors. For the purpose of elucidating the specificities of the independent place accorded to victims by the Court's normative basis, the thesis brings forth a number of core characteristics that delimit the standing of victim-participants and distinguish it, accordingly, from the standing of the parties, *i.e.* the Prosecutor and the defence, as well as from other non-party participants, such as witnesses.

The first question that the victim-related context brings to the surface concerns the eligibility of a person as a victim pursuant to rule 85 of the Rules of Procedure and Evidence ('the Rules'), which is the starting point for any involvement of victims in the course of the proceedings. Accordingly, Chapter I of the thesis will explore the multifaceted matters ensuing from the application and interpretation of the provision as a whole, as well as of each of the eligibility criteria which it delineates. The study will focus on multifarious and/or contentious issues which have either already emerged in practice or need yet to be addressed by the Court, such as the identification requirements for victim-applicants; deceased persons as victims; the problem of disappeared individuals; the implications of the introduction of certain legal entities as victims; the notion, substance and compass of the relevant harm depending on the group of victims (natural or legal persons); interpretation and application of the requirement for a causal link between the harm suffered and the alleged crime(s). This part of the research will conclude with the discussion of the interrelation between the victim definition and, respectively, the recognition of a person as a victim and one of the 'backbones'¹¹ of international criminal procedure - the presumption of innocence.

An important highlight into the autonomous yet non-party standing of victims within the ICC's procedural design is provided in Chapter II by way of a comprehensive

informal way (in town-hall settings where victims were given the possibility to act as judges and jury with respect to low level perpetrators).

¹⁰ Valentina Spiga, 'No Redress without Justice. Victims and International Criminal Law', *Journal of International Criminal Justice* 10 (5) (2012), pp. 1377-1394, p. 1378.

¹¹ Salvatore Zappalà, 'The Rights of Victims v. the Rights of the Accused', *Journal of International Criminal Justice* 8 (2010), pp. 137-164, p. 140.

categorization of the array of rights afforded by the ICC's normative framework to persons who meet the criteria of rule 85.¹² The classification of the rights that victims may employ in the course of the proceedings, suggested herewith, proves innovative and unprecedented, as it goes beyond the commonplace division of victims' rights between the right to participation, the right to reparations and the right to protection advanced so far in the legal literature. The review of the victims' rights will attest to the fact that the involvement of victims is neither indispensable at the inception of the criminal process, *i.e.* for the initiation of an investigation, nor subsequently, for the further development and conduct of proceedings. In other words, the substance and the scope of the rights accorded to victims by the drafters will reveal that the participation of victims in the ICC's proceedings 'is not *strictu sensu* essential', since the criminal process can take place without them.¹³ Furthermore, as evidenced by the present classification, the victims' rights are more limited in scope and substance than the rights accorded to the Prosecutor and the defence. By contrast to the parties, victims are neither vested with an automatic nor with an untrammelled right of participation.¹⁴

The substance and the contours of the right of victims to take part in proceedings pursuant to the general participation scheme set forth by the drafters is addressed, accordingly, in Chapter III. The thesis suggests a thorough dissection of the nature and the confines of the fundamental, core right of victims to participate in proceedings enunciated in article 68(3) and the manifold issues which it entails. The proper interpretation of each of the prerequisites for victims' involvement in proceedings set forth in article 68(3), such as the correct connotation of the notion 'personal interests', 'appropriateness' of the proceedings and of the intervention, 'are affected', as well as 'views and concerns', has a direct bearing on the manner and the extent to which victims may intervene in the ICC's proceedings. As the scrutinized study of the prerequisites of article 68(3) will underscore, the intervention of victims in proceedings on the merits, unlike the Prosecutor and the

¹² For the sake of brevity, any reference to 'article' denotes 'article of the Rome Statute', as well as any reference to 'rule' denotes 'rule of the ICC's Rules of Procedure and Evidence', unless stated otherwise in the text.

¹³ See David Donat-Cattin, 'Article 68: Protection of victims and witnesses and their participation in the proceedings', *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes Article by Article*, Otto Triffterer (ed.), 2nd edition, Beck/Hart, pp. 1275-1300, p. 1280 and footnote 17, as well as 'The Role of Victims in the ICC Proceedings', in F. Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute*, Teramo: University of Teramo, 1998, pp. 251-272, p. 266. However, in the view of the present author the suggested distinction between 'necessary' parties to the proceedings (the Prosecutor and the defence) and 'potential' or optional parties (the victims) should be avoided. The term 'parties' should be construed strictly and employed in tune with the ICC's legal framework, *i.e.* as comprising only the Prosecutor and the defence.

¹⁴ See, *inter alia*, Jorda and de Hemptinne, *supra* note 1, p. 1406; Donat-Cattin, *supra* note 13.

defence, can neither take place as of right nor without limitations at the expense of other equally essential criminal justice values, such as due process, fairness, impartiality and expeditiousness of the proceedings.

The conditional possibility of victims to intervene in proceedings, by contrast to the parties, further resonates in the manner and the extent to which victims could engage in the ICC's fact-finding procedure on the merits of the criminal case. It is rather striking that the relevant literature to date does not provide a thorough insight into the engagement of victim-participants in the evidentiary process taking place at the ICC. Similarly, only sporadic attention is paid by commentators to the phenomenon of duality of status, that is, the possibility of victims to appear simultaneously as witnesses in the one and the same case. As Chapter IV will show, the latter issue has an impact on the quality and the completeness of the evidentiary material collected in the course of the proceedings. The study on duality of victim-witness status elaborated herewith touches upon a multitude of central evidentiary matters, such as relevance, admissibility, reliability and credibility of evidence. A meticulous consideration is also given to the repercussions on the conduct and the outcome of the case ensuing from the collection of insufficient and, accordingly, of superfluous evidence alike. Likewise, the discussion of duality of victim-witness status contributes to shedding further light on the parallel between the standing of victims before the ICC and the legal condition¹⁵ of other non-party participants, in particular, witnesses. The research on duality of victim-witness status will reiterate the fact that victims have the right to intervene in the ICC's proceedings upon their individual choice and initiative, as well as in their own interest. Unlike victims who enjoy the autonomy to decide whether to avail themselves of their right to play part in the criminal justice process subject to the relevant requirements enunciated by law, witnesses appear in the ICC's proceedings not upon their personal initiative, but only and as long as they are called to testify.¹⁶ In other words, by contrast to victims, the participation of witnesses in proceedings is confined to

¹⁵ This wording is used interchangeably with the word 'status' (*see in this respect, Situation in the Democratic Republic of Congo (Situation in the DRC)*, Appeals Chamber, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, 19 December 2008 (*Situation in the DRC*, Appeals Chamber Decision of 19 December 2008), para. 44, according to which the 'word "status" signifies a person's legal condition, whether personal or proprietary [with reference to Black's Law Dictionary]').

¹⁶ *See* article 64(6)(b) and rule 65.

giving testimony before the Court, thus, to serving the interests of justice rather than their own personal interests.

Equally pivotal for the proper illumination of the place and the role of victims within the ICC's architecture is the question regarding the possibility for victims to contribute and, accordingly, to impact the evidentiary material germane to the subject-matter of the case. The analysis in Chapter V lends support to the conclusion that the involvement of victims in the fact-finding procedure is considerably restricted in comparison to the Prosecutor and the defence. The limited intensity and extent of engagement of victim-participants in the evidentiary process is another vital and unequivocal indication of the distinct standing accorded to victim-participants as compared to the parties. However, as the research endeavours to show, this conclusion is without prejudice to the key role played by victims in proceedings on reparations and, accordingly, in the collection and examination of evidence concerning reparation claims. The part played by victims in the evidentiary process on the merits of the criminal case and in reparation proceedings, as well as the duality of status phenomenon are contemplated against the backdrop of the overall rationale of the ICC's fact-finding procedure, including the respective roles of the parties and the Chamber, together with core evidentiary concepts and overarching principles in the realm of evidence law.

In view of the topics outlined above, the thesis does not purport to represent a comprehensive analysis of all the victim-related issues. Such an objective would hardly prove feasible due to the numerous and multifarious matters which the participation of victims in the ICC's proceedings entails. Instead, the research identifies and comprises those matters that are of fundamental importance for delimiting the *sui generis* standing of victims as protagonists in their own right and place in the ICC's arena, both in the Court's procedural design and in its evidentiary process.

Given the fact that the role and the place of victims, just like the ICC's legal framework and system as a whole, are premised on the 'common core of legal concepts and precepts shared by some or even most of the world's legal systems [of today]',¹⁷ each topic in the thesis is contemplated from a comparative perspective. The research aims at providing an insight into the place and role of victims at the ICC against the backdrop of the prevailing tendencies, modern trends and models of victims' participation in criminal

¹⁷ Rudolph B. Schlesinger, Ugo Mattei, Teemu Ruskola, Antonio Gidi, *Schlesinger's Comparative Law. Cases, Text, Materials*, 7th edition (University Casebooks), Foundation Press, 2009, p. 42.

jurisdictions at both the domestic and the international levels alike. The comparative analysis is, however, not confined to the field of criminal justice. As the present study will reveal, a glance from a wider perspective provides equally useful guidance for the accurate interpretation of some of the core issues addressed in the thesis. To start with, as evidenced in the following chapter, considering the eligibility as a victim in light of the legal frameworks and jurisprudence of regional human rights institutions, as well as other (quasi)adjudicative bodies at the supranational level, affords an in-depth illumination of the origins of the notion ‘victim’ and of the criteria for victim status set forth in rule 85.

CHAPTER ONE

Victims' Eligibility Pursuant to Rule 85¹⁸

A thorough discussion of any involvement of victims in the ICC's process is necessarily preceded by the question of who qualifies as a victim before the Court. Consequently, any provision envisaging victims' rights and/or participation throughout the criminal justice process¹⁹ comes into consideration only after the fulfillment of the requirements delineated in rule 85.²⁰ The latter is a concurrent fundamental provision in the ICC's statutory documents as it defines who qualifies as victim before the Court.²¹ This question is the starting point for the recognition of an individual *qua* victim and, as such, represents the first step in the assessment of any right of victims' involvement in the proceedings.²² The recognition of victim status thus entails the possibility for the enjoyment of 'benefits associated with victimhood'.²³ Bearing in mind the importance of rule 85, it is rather striking that it is somewhat overlooked in the literature on the ICC. Reference to this legal text is usually made in the context of the entire scheme for victims' participation, but it tends to be cursory and sporadic.

The centrality of rule 85 lies within its design to identify the ambit of the term 'victim' for the purposes of the ICC's constitutive documents. According to this provision 'victims' means: (a) 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'; and (b) 'organizations or institutions that have sustained direct harm to any of their property which is dedicated to

¹⁸ A previous draft of this chapter has been published as 'Victims' Eligibility before the International Criminal Court in Historical and Comparative Context', *International Criminal Law Review*, vol. 11, issue 4 (2011), pp. 665-706.

¹⁹ Such as, *inter alia*, article 15(3) read together with rule 50(3); article 19(3) read together with rule 59(1).

²⁰ See Susana SáCouto and Katherine Cleary, 'Victims' Participation in the Investigations of the International Criminal Court', *Transnational Law and Contemporary Problems*, vol. 17:73 (2008), pp. 74-105, p. 88.

²¹ Although the victim-related provisions in the Statute may seem conditioned upon the application of one of the Rules, in the hierarchy of the ICC's constitutive documents the latter are subordinate towards the Statute. The Rules complement the Statute and serve as an instrument for the application of its provisions by elucidating the substance of certain notions used, but not defined in the Statute. See articles 21(1)(a) and 51(4) and (5), as well as the explanatory note to the Rules.

²² Elisabeth Baumgartner, 'Aspects of Victim Participation in the Proceedings of the International Criminal Court', *International Review of the Red Cross*, vol. 90, 870 (June 2008), pp. 409-440, p. 417; Miriam Cohen, 'Victims' Participation Rights Within The International Criminal Court: A Critical Overview', *Denver Journal of International Law and Policy*, vol. 37, 3 (Summer 2009), pp. 351-377, p. 366.

²³ Joris van Wijk, 'Who is the 'little old lady' of international crimes? Nils Christie's concept of the ideal victim reinterpreted', *International Review of Victimology*, vol. 19(2) (2013), pp. 159-179, p. 160.

religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects of humanitarian purposes.’

Having in mind the broad nature of this victim notion, its accurate analysis proves critical for the operation of the victims’ participation scheme and may have an impact on the expeditiousness of the relevant proceedings before the Court.²⁴ The present chapter addresses the numerous important and complex matters originated by the interpretation of the distinct eligibility requirements enshrined in rule 85, *i.e.* the victim must be a natural person or a legal entity in the form of organization or institution; the victim must have sustained harm; the crime from which the harm ensued must fall within the jurisdiction of the Court; there must be a causal link between the crime and the harm. Although bearing certain nuances depending on the group of victims, the eligibility criteria adhere to the same overarching principles and thus, overlap to a great extent. The majority of the requirements raise concerns as to their interpretation in the conflicting jurisprudence of the ICC’s Chambers in that respect, especially at its inception.

I. Application of Rule 85 in the Course of the Proceedings

The legal condition of victim as delineated in the ‘catch-all’ provision²⁵ of rule 85 cannot be determined in the abstract, but in the context of concrete proceedings.²⁶ As the ICC’s Appeals Chamber (‘the Appeals Chamber’) has observed, ‘[t]he location of rule 85 in the Rules is indicative of a general provision relating to victims, applicable to various stages of the proceedings’.²⁷ Hence, the victim definition may attract two opposing views as regards its application in the course of the proceedings: one advancing the uniform application of the eligibility criteria irrespective of the particularities of the different stages of the criminal justice process and another favouring an application depending on

²⁴ As observed by commentators, ‘a broad interpretation of the notion of victim risks creating a backlog in the proceedings, undermining the ability of the Court to efficiently implement its mandate [footnote omitted]’. See Valentina Spiga, ‘Indirect Victims’ Participation in the *Lubanga* Trial’, *Journal of International Criminal Justice* (2010) 8 (1), pp. 183-198, p. 186.

²⁵ Håkan Friman, ‘The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?’, *Leiden Journal of International Law* 22 (2009), pp. 485-500, p. 490.

²⁶ Note, however, the existence of an understanding in the opposite vein in the initial jurisprudence of Pre-Trial Chamber I, according to which a ‘victim procedural status’ was to be assessed and, respectively, granted outside a judicial proceeding.

²⁷ *Lubanga*, Appeals Chamber, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06-1432, 11 July 2008 (Appeals Chamber Judgment of 11 July 2008), paras. 57-58.

the nature, purpose, scope and stage of the proceedings at hand. The first understanding would prove untenable because it would fail to take into account the distinctiveness of the various proceedings²⁸ and stages of the criminal justice process at which the assessment of the rule 85 criteria is to be performed. Furthermore, each subsequent stage of the criminal justice process is marked by higher specificity and concreteness than the preceding one. With the development of the proceedings the events and facts under consideration also crystallize and narrow in scope. Similarly, the victims' eligibility criteria become more specific and precise. Hence, the more advanced the stage of the proceedings, the higher the threshold of the victims' eligibility requirements which must be met.

The temporal, geographic and personal parameters of a situation are considerably wider and subsume the parameters of all cases which may arise from it. The investigation of a situation takes place at an earlier stage of the proceedings and covers much broader scale of events. Consequently, as potential cases originate from situations, they have a significantly narrower ambit. Cases focus on particular crimes within the Court's jurisdiction individualized in terms of the identity of the alleged perpetrators and the alleged harm inflicted through their commission. Logically, the victims' eligibility criteria should be applied and construed more flexibly within the context of a situation as they bear less specificity and concreteness than they do in a case.

An illustration of an early procedural stage where the threshold of the rule 85 criteria is considerably lower and lacks much specificity are the proceedings pursuant to article 15(3). This procedure takes place prior to the commencement of the actual criminal proceedings and is based on the preliminary examination of the Prosecutor of the information provided to him or her. The purpose of victims' representations within this particular proceeding is to express the prevailing stance of the community of individuals affected as a whole by an alleged criminal conduct with regard to the Prosecutor's request to the Pre-Trial Chamber for authorization of an investigation. Victims' representations are confined to providing the Chamber with a general idea of the prevalent disposition of the respective population towards the initiation of an investigation by the Prosecutor in order to make a useful contribution to the final determination to be made by the Pre-Trial Chamber. Hence, the representations made by victims within the article 15(3) proceedings serve exclusively the purpose of 'express[ing] their position on a possible investigation [to

²⁸ *I.e.* proceedings on the merits, proceedings pursuant to articles 15(3) and 19(3), reparation proceedings pursuant to article 75.

be undertaken by the Prosecutor] or not’.²⁹ Evidently, at this specific stage a thorough, strict and detailed assessment of the requirements pursuant to rule 85 to each person within the affected community or group of individuals would be unwarranted.

A flexible approach in the application of rule 85 has been embraced by Pre-Trial Chamber II (‘PTC II’) in the Order to the Victims Participation and Reparations Section Concerning Victims’ Representations Pursuant to Article 15(3).³⁰ The Chamber applied the eligibility criteria creatively, emphasizing the particular nature and the narrow scope of the article 15 proceeding, as well as the limited involvement of victims therein. The rule 85 requirements were outlined in very broad and general terms and were applied to groups of victims and even to a wider category of ‘affected groups’. The same principled approach was subsequently endorsed in the more recent jurisprudence of the Court. Noting the specific and limited purpose of representations within the context of the article 15 proceeding Pre-Trial Chamber III (‘PTC III’) applied the rule 85 criteria not only to individual victims, but also to the victimized community represented by the respective community leader(s).³¹

The need for a varied approach adapted to the stage of the proceedings has also been addressed by Pre-Trial Chamber I (‘PTC I’), albeit in a different context. The Chamber advanced the view that during an investigation of a situation the status of victim will be accorded to applicants who fall within the victim definition in relation to the situation, whereas, at the case stage, victim status will be accorded to applicants who meet the eligibility criteria in the context of the case.³²

Besides the specific stage of the ICC’s process, at which the victim status is to be assessed, it is likewise pertinent that the victim’s eligibility criteria are considered in light of the nature and object of the concrete proceedings, as well as the purpose of the victims’ intervention therein. This proves of particular importance in the context of the first eligibility criterion – the ‘natural persons’ criterion – and, more specifically, for the proper resolution of the issue concerning deceased individuals.

²⁹ *Situation in the Republic of Kenya*, Pre-Trial Chamber (PTC) II, Order to the Victims Participation and Reparations Section Concerning Victims’ Representations Pursuant to Article 15(3) of the Statute, ICC-01/09-4, 10 December 2009, para. 10.

³⁰ *Ibid.*

³¹ *Situation in the Cote d’Ivoire*, PTC III, Order to the Victims Participation and Reparations Section Concerning Victims’ Representations Pursuant to Article 15(3), 6 July 2011, para. 10.

³² *Situation in the DRC*, PTC I, Decision on Victims’ Applications for Participation in the Proceedings, ICC-01/04-101-tEN-Corr, 17 January 2006 (*Situation in DRC*, PTC I, 17 January 2006), para. 66.

II. The First Criterion: Natural Persons and Legal Entities

1. Natural Persons

Natural persons are the first group of victims set out in rule 85(a). The ‘natural persons’ eligibility requirement seems unequivocal at first glance and may be regarded as the ‘most clear-cut and unproblematic’,³³ and of little complexity.³⁴ This criterion was interpreted by the Court in ‘the ordinary meaning of the term “natural person” as “a human being”’.³⁵ Consequently, the Court reached ‘the rather banal conclusion’³⁶ that ‘[a] natural person is any person who is not a legal person.’³⁷ A more comprehensive consideration is suggested in the legal literature, according to which ‘natural persons’ are ‘legal subjects (*sujet[s] de droit*) with full juridical capacity since such a juridical relevance stems from the natural capability of exercising inherent rights and duties.’³⁸

Although the ‘natural persons’ requirement may appear straightforward, to conclude that it does not cause any ambiguity or complexity would be impetuous. A thorough scrutiny of the first criterion detects a number of contentious issues. Among the most pressing ones are the identification of natural persons, as well as the highly debatable question of deceased persons. In light of the ICC’s case-law both issues prove to be far from unproblematic.

1.1. Identification Requirements

The need that the applicant’s identity be duly established is undoubtedly essential, so that the victim status be accorded to actual individuals. At the same time, the scope and nature

³³ Yvonne McDermott, ‘Some Are More Equal than Others: Victim Participation in the ICC’, *Eyes on the ICC*, vol. 5:1 (2008-2009), pp. 23-48, p. 30.

³⁴ Baumgartner, *supra* note 22, p. 419.

³⁵ *Situation in DRC*, PTC I, 17 January 2006. Recourse to the notion of ‘human being’ is also made in the definition of the term ‘person’ in article 1(2) of the American Convention on Human Rights, according to which ‘person’ “means every human being”.

³⁶ Baumgartner, *supra* note 22, p. 418.

³⁷ *Situation in DRC*, PTC I, 17 January 2006, para. 80; see also Black’s Law Dictionary, Eighth Edition (2004), according to which ‘[a] ‘natural person’ is a human being, as distinguished from an artificial person created by law.’

³⁸ See Gioia Greco, ‘Victims’ Rights Overview under the ICC Legal Framework: A Jurisprudential Analysis’, *International Criminal Law Review* 7 (2007), pp. 531–547, p. 535.

of the identification requirements must be tailored to the available means for proof of identity. Hence, the application of the identification criteria must reconcile two major concerns: 1) the identification materials should not be clouded with any doubt as to the applicant's actual identity and 2) the applicants should not be deprived of the possibility to be recognized as victims due to impediments beyond their control. In order for the two concurrent objectives to be achieved, a well-balanced and flexible approach must be adopted when elaborating and applying the identification requirements.

This view finds support in the practice of international adjudicative bodies and in the relevant literature. Commentators agree upon the creative application of the identification prerequisites acknowledging that in conflict zones and areas lacking operational registration systems individuals are very likely to lose their identification documents and are often deprived of access to public records.³⁹ Thereby, victim-applicants encounter numerous obstacles in proving their identity ensuing from the difficult conditions surrounding them. Destruction of documents and/or lack of documentation are widely acknowledged in the legal literature as a common and a frequent problem in the aftermath of mass atrocities.⁴⁰ In view of the frustration of victim-applicants who run the risk to be rejected admission in proceedings because of an inability to generate evidence of their alleged victimization, commentators suggest that it is critical that adjudicative institutions modify their standards of proof of the applicant's identity depending on the circumstances of the case.⁴¹

Observers point to the relaxed evidentiary standards with respect to a claimant's eligibility and the determination of claims in the context of mass claims processes, such as the Claims Resolution Tribunals for Dormant Accounts in Switzerland and the German Forced Labour Programme. Notably, the Rules of Procedure of the First Claims Resolution Tribunal for Dormant Accounts in Switzerland have introduced the explicit stipulation that, when assessing the information submitted to them, the sole arbitrators or the Claims Panel shall at all times bear in mind difficulties in proving a claim after the destruction of World War II and the Holocaust and the long time elapsed since the

³⁹ See Jorda and de Hemptinne, *supra* note 1, p. 1411; Heike Niebergall, 'Overcoming Evidentiary Weaknesses in Reparation Claims Programmes' in C. Ferstman *et al.* (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity. Systems in Place and Systems in the Making*, Martinus Nijhoff, 2009, pp. 145-166, p. 149; Lutz Oette, 'Bringing Justice to Victims? Responses of Regional and International Human Rights Courts and Treaty Bodies to Mass Violations', in C. Ferstman *et al.* (eds.) (*in ibid.*), pp. 217-242, p. 226.

⁴⁰ *Ibid.*

⁴¹ See Stover *et al.*, *supra* note 2, p. 542.

opening of the dormant accounts.⁴² This approach has been endorsed in the jurisprudence of the Second Claims Resolution Tribunal for Dormant Accounts in Switzerland, which in its determination on the claims applied rather relaxed criteria.⁴³ In the same vein, the German Forced Labour Programme⁴⁴ has introduced relaxed standard of proof of a claimant's eligibility. To the same effect, with respect to the determination of claims, the Programme's Supplemental Principles and Rules of Procedure provide that '[a] claim cannot be rejected on the sole ground that it is not supported by official documentary evidence.'

The impediments in meeting the required standard of proof for victims in conflict zones are duly acknowledged also by other adjudicative bodies at the international level. The United Nations ('UN') Compensation Commission,⁴⁵ for instance, took into account the difficult circumstances of Iraq's invasion and occupation of Kuwait and ruled that 'many claimants cannot, and cannot be expected to, document all aspects of a claim. In many cases, relevant documents do not exist, have been destroyed, or were left behind'.⁴⁶ This ruling portrays the general understanding of the UN Compensation Commission about victims' lack of access to documentation relevant to all aspects of a claim, the identity of the claimant(s) being one of them. Similarly, the Inter-American Court of Human Rights ('the IACtHR', 'the Inter-American Court') has recognized alternative methods for the proof of victims' identity depending on the peculiarities and accessibility of the respective registration systems.⁴⁷

⁴² The Tribunal was established in 1997 for the purpose of adjudicating claims concerning the entitlement of non-Swiss nationals and/or residents to dormant bank accounts held in Swiss banks set out in published lists. See in more detail on this issue Jacomijn van Haersolte-van Hof, 'Innovations to Speed Mass Claims: New Standards of Proof' in *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges*, edited by The International Bureau of the Permanent Court of Arbitration, Oxford University Press, 2006, pp. 13-23, p. 15 *et seq.*

⁴³ See *ibid.*, pp. 18-19. The Tribunal was established in 2001 on the basis of newly discovered additional dormant accounts. In the absence of evidence to the contrary, the Tribunal applied presumptions as to the entitlement of the claimants.

⁴⁴ See *ibid.*, pp. 20-21. Established by virtue of the German Law on the Establishment of a Foundation 'Remembrance, Responsibility and Future'.

⁴⁵ Established as a subsidiary organ of the United Nations Security Council pursuant to para. 18 of UN Security Council Resolution 687/1991 of 3 April 1991 and UNSC Resolution 692/1991 of 20 May 1991 to process claims and to pay compensation for any direct loss, damage and injury resulting from Iraq's invasion and occupation of Kuwait and to administer the fund created for the payment of such compensation.

⁴⁶ Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the First Instalment of Individual Claims for Damages above USD 100 000 (Category 'D' Claims) (S/AC.26/1998/1 of 3 February 1998).

⁴⁷ *Moiwana Community v. Suriname*, Judgment on the Merits and Reparations of 15 June 2005, Series C No. 124, para. 178; *Aloeboetoe et al. v. Suriname*, Judgment of 10 September 1993 on Reparations and Costs, Series C No. 15, para. 64; *Plan de Sánchez Massacre v. Guatemala*, Judgment on Reparations of 19 November 2004,

Human rights bodies are sensitive to the fact that lack of access to evidentiary material regarding identity is merely one among the numerous problems for victims in conflict zones. Therefore, in addition to considerably lowering and adapting the identification criteria to the factual circumstances, human rights bodies tend to adopt flexible requirements concerning the filing of applications on behalf of victims. An illustration of this approach is to be found in the legal framework of the African Commission on Human and Peoples' Rights ('the African Commission'). The relevant provisions envisage the possibility for petitions or communications claiming human rights violations to be filed on behalf of third persons, whom the petitioner neither knows nor has any relationship with (kinship, representation) - also known as *actio popularis*.⁴⁸ This approach of the African Charter on Human and People's Rights ('the African Charter') may be explained by the fact that in conflict areas it is difficult if not even impossible for victims themselves to pursue national or international channels of remedy.⁴⁹

The initial jurisprudence of the ICC reveals a propensity towards a strict approach governing the applicants' identity. The requisites were applied uniformly, regardless of the personal circumstances of the applicants.⁵⁰ This understanding failed to consider the specificities surrounding individuals and, thus, proved unsustainable. Furthermore, the Court itself recognized the likelihood that in some areas the available proofs of identity may not be of the same type as they would be in other less tumultuous areas.⁵¹ Subsequently, the requirements were adapted to the particular factual circumstances, thus,

Series C No. 116, para. 63; *Ituango Massacres v. Colombia*, Judgment of 1 July 2006, Preliminary Objections, Merits, Reparations and Costs, Series C No. 148, para. 94.

⁴⁸ See articles 55 and 56 of the African Charter on Human and People's Rights and rule 104 of Procedure of the African Commission.

⁴⁹ *Malawi African Association and Others v. Mauritania*, African Commission on Human and Peoples' Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000), para. 78. *Actio popularis* is also envisaged in article 44 of the American Convention on Human Rights, as well as in article 87(d) of the Human Rights Council Resolution 5/1 (*Institution-building of the United Nations Human Rights Council*, 18 June 2007). On the contrary, the legal framework of the ECtHR does not envisage such form of public interest litigation (see article 34 ECHR). For further reference on *actio popularis* see Oette, *supra* note 39, pp. 221-222.

⁵⁰ *Situation in Uganda*, PTC II, Decision on Victims' Applications for Participation, ICC-02/04-101, 10 August 2007 (*Situation in Uganda*, PTC II, 10 August 2007) and *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen (Kony et al.)*, PTC II, Decision on Victims' Applications for Participation, ICC-02/04-01/05-252, 10 August 2007 (*Kony et al.*, PTC II, 10 August 2007). A number of strict requirements were set with regard to the nature and form of the identification documents, which significantly narrowed the range of the admissible evidentiary material.

⁵¹ *Ibid.* Nevertheless, the strict approach was retained: a simple statement by an individual belonging to a local authority that a given applicant 'is a victim' of a specific incident was regarded as falling short of the requirements for an adequate proof of identity. By contrast, in the *Situation in the DRC* on the basis of similar findings PTC I applied a more flexible evidentiary threshold - see the Decision on the Requests of the Legal Representative of the Applicants on the application process for victims' participation and legal representation, ICC-01/04-374, 17 August 2007 (*Situation in DRC*, PTC I, 17 August 2007).

the threshold for the proofs of identity was lowered.⁵² Gradually the logical conclusion was reached that a balance was needed between the establishment of the applicants' identities with certainty and their personal circumstances. The Court acknowledged the need to ensure that victims must not be unfairly deprived of an opportunity to participate for reasons beyond their control.⁵³ This positive development in the ICC's jurisprudence is a clear illustration of the untenability of the initial uniform and strict application of the identification criteria. An inference along the same lines is premised on the fact that at present the Chambers unanimously follow creative and moderate approach in the assessment of the applicants' proofs of identity.⁵⁴

1.2. Deceased Persons

Another complex issue within the scope of the first eligibility criterion concerns deceased persons. The jurisprudence of the Court is marked by the dilemma of whether persons who are no longer alive are encompassed by rule 85(a).⁵⁵ In other words, the issue arises whether deceased persons are 'natural persons' and are, accordingly, entitled to victim status in proceedings before the ICC.

The comparative review of the legal frameworks and jurisprudence of international(ized) adjudicative institutions does not suggest a unanimous answer in that

⁵² *Situation in Uganda*, PTC II, Decision on Victims' Applications for Participation, ICC-02/04-125, 14 March 2008 (*Situation in Uganda*, PTC II, 14 March 2008), and *Kony et al.*, PTC II, Decision on Victims' Applications for Participation, ICC-02/04-01/05-282, 14 March 2008. The Single Judge embraced the idea of a moderate threshold of the identification criteria and their application in light of the specific conditions in the region following the findings in the report of the VPRS. See in the same vein *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang ('Ruto et al.')*, PTC II, First Decision on Victims' Participation in the Case, ICC-01/09-01/11-17, 30 March 2011 (First Decision on Victims' Participation in the Case), paras. 7-8, where the Single Judge acknowledged the 'difficulties victim applicants [...] may encounter in obtaining or producing copies of official identity documents, such as a passport' and thus regarded as acceptable other substitute forms of identification to official documentation, in case the latter would be non-available.

⁵³ *Lubanga*, Trial Chamber I, Decision on Victims' Participation, ICC-01/04-01/06-1119, 18 January 2008 (*Lubanga*, TC I, 18 January 2008), para. 87; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Ngudjolo (Katanga and Ngudjolo)*, Trial Chamber II, Decision on the Treatment of Applications for Participation, ICC-01/04-01/07-933-tENG, 26 February 2009 (*Katanga and Ngudjolo*, TC II, 26 February 2009).

⁵⁴ *Situation in DRC*, PTC I, 17 August 2007; *The Prosecutor v. Bahar Idriss Abu Garda (Abu Garda)*, PTC I, Decision on the 34 Applications for Participation at the Pre-Trial Stage, ICC-02/05-02/09-121, 25 September 2009 (*Abu Garda*, PTC I, 25 September 2009), and *The Prosecutor v. Jean-Pierre Bemba Gombo (Bemba)*, PTC III, Fourth Decision on Victims' Participation, ICC-01/05-01/08-320, 12 December 2008 (*Bemba*, PTC III, 12 December 2008).

⁵⁵ The jurisprudence of the Appeals Chamber lacks a clear and firm standpoint on this matter. The stance of the Chamber remains vague. See *Situation in Darfur, Sudan*, Appeals Chamber, Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against PTC I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against PTC I's Decision of 6 December 2007, ICC-02/05-138, 18 June 2008, para. 54(c).

respect. On the one hand, the Transitional Rules of Criminal Procedure⁵⁶ of East Timor's Special Panels for Serious Crimes in the District Court of Dili ('East Timor's hybrid court') do not consider deceased persons as victims. Instead, the relevant provisions envisage the fact of death as a prerequisite for the individuals surviving the deceased to qualify *qua* victims in their personal capacity and not on behalf of the deceased. According to this approach, the death of an individual represents a harm suffered by the next of kin due to the loss of a person of close relation as a consequence of the crime. Hence, the successors are entitled to claim victim status only on their own behalf on the basis of several distinct harms endured in their personal capacity – the loss of their next of kin and also other damages sustained as a consequence of the alleged crime. The successors can either be indirect victims due to their suffering from the loss of a family member and all other secondary losses stemming from this fact or direct victims due to harm(s) inflicted upon them through the commission of the alleged crime.⁵⁷ Admittedly, these two scenarios may often be interrelated. The harm sustained by the successor may be both direct and indirect – such as the loss of a close relative and/or beloved one combined with personal injuries suffered from the crime.

The roots of the approach just contemplated can be traced back to the early 1920s in the wake of World War I in the jurisprudence of the USA-Germany Mixed Claims Commission⁵⁸ in the *Lusitania* cases.⁵⁹ According to the Commission, in death cases the basis of damages is not the physical or mental suffering of the deceased, their loss or the loss to their estate, but the losses resulting to claimants from the death of the individual.

Notwithstanding the examples suggested hitherto, the conception favouring the recognition of deceased persons as victims proves to be prevailing among human rights

⁵⁶ Adopted by the United Nations Transitional Administration in East Timor (UNTAET) by virtue of Regulation 2000/30 (25 September 2000), amended by UNTAET/REG/2001/25 (14 September 2001). Section 1(x) of the General Provisions of the Transitional Rules of Criminal Procedure in East Timor defines as victims 'the spouse, partner or immediate family member of a deceased person whose death was caused by criminal conduct'.

⁵⁷ Such understanding is in tune with the ICC's Appeals Chamber's view that 'the notion of victim necessarily implies the existence of personal harm but does not necessarily imply the existence of direct harm' –*Lubanga*, Appeals Chamber Judgment of 11 July 2008, para. 38.

⁵⁸ Established to settle specific categories of claims of American nationals by virtue of the Agreement of August 10, 1922 signed in Berlin between the USA and Germany. The Agreement was concluded pursuant to the USA Congress' Knox-Porter Resolution of 2 July 1921 and the Peace Treaty between Germany and the USA of 25 August 1921. The Commission functioned from 1922 until 1939.

⁵⁹ *Opinion in the Lusitania Cases*, 1 November 1923, Reports of International Arbitral Awards, vol. VII, United Nations, 2006, p. 35. In these cases, which arose as a consequence of the sinking of the British ocean liner *Lusitania* by a German submarine on 7 May 1915, Germany was found obliged to pay to the USA all losses suffered by American nationals as a result of the death or other immaterial or material damages sustained in the sinking of the liner.

institutions. Within this approach the following nuances can be described: 1) deceased are explicitly envisaged as victims in the legal framework; 2) deceased are implicitly included within the ambit of victims in the constitutive documents; 3) deceased are identified as victims throughout the jurisprudence of the adjudicative body.

An illustration of the first variation is to be found in the legal framework of the Human Rights Chamber of the Commission on Human Rights for Bosnia and Herzegovina.⁶⁰ The Rules of Procedure provide that claims for human rights violations may be filed on behalf of alleged victims who are deceased or missing.⁶¹ In addition, the Human Rights Chamber throughout its jurisprudence has acknowledged deceased persons as victims of violations of certain human rights legal instruments.⁶²

Features of the second prong can be discerned in the legal texts of the United Nations Human Rights Committee.⁶³ Although the Rules of Procedure do not refer to deceased explicitly, they equally lack restriction as to the groups of victims (whether children, disabled, disappeared or deceased) on whose behalf a submission can be made.⁶⁴ Thus, the literal and contextual analysis of the relevant provisions lends support to the inference that deceased persons are implicitly included within the compass of the victim notion. An unequivocal indication in the same vein is premised on the numerous occasions in which the Committee has recognized deceased as victims of violations of the International Covenant on Civil and Political Rights.⁶⁵

⁶⁰ Established pursuant to article 2 of the Agreement on Human Rights (concluded as Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina on 14 December 1995 between the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and Republika Srpska – the ‘Dayton Peace Agreement’).

⁶¹ According to rule 32(1) of the Rules of Procedure of the Human Rights Chamber (adopted pursuant to article 10(1) and (2), and article 12 of the Agreement on Human Rights) ‘[p]ersons, non-governmental organisations, or groups of individuals claiming to be a victim of a violation by any Party or acting on behalf of alleged victims who are deceased or missing, may present and conduct applications under Article VIII para. 1 of the Agreement’.

⁶² See *E.M. and S.T. against the Federation of Bosnia and Herzegovina*, Decision on admissibility and merits, 8 March 2002, Case no. CH/01/6979. The Chamber with respect to the deceased S.T. found a ‘negation of [...] [the] right to life as protected by Article 2 of the [European Convention on Human Rights]’ and a ‘discrimination [...] in the enjoyment [by the deceased] of Article 5(a) and (b) of the Convention for the Elimination of All Forms of Racial Discrimination’ – see paras. 59, 85(2) and 85(4).

⁶³ Established pursuant to article 28 of the International Covenant on Civil and Political Rights. See the Optional Protocol to the International Covenant on Civil and Political Rights (G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302 stipulating the Committee’s competencies.

⁶⁴ According to rule 90(b) of the Committee’s Rules of Procedure (U.N. Doc. CCPR/C/3/Rev.6 (as revised on 24.04.2001), ‘a communication submitted on behalf of an alleged victim may [...] be accepted when it appears that the individual in question is unable to submit the communication personally’.

⁶⁵ *Eduardo Bleier v. Uruguay*, Communication No. R.7/30, U.N. Doc. Supp. No. 40 (A/37/40) at 130 (1982); *John Khemraadi Baboeram, Andre Kamperveen, Cornelis Harold Riedewald, Gerald Leckie, Harry Sugrim Oemrawsingh, Somradj Robby Sohansingh, Lesley Paul Rahman and Edmund Alexander Hoost. v. Suriname*,

Similarly, although the Provisional Rules for Claims Procedure ('the Provisional Rules')⁶⁶ of the UN Compensation Commission do not make an express reference to deceased persons, the latter have been recognized as victims upon the adoption of Governing Council's Decisions 7⁶⁷ and 12.⁶⁸ The two decisions introduced an additional category of individual claims ('claims of individuals not otherwise covered')⁶⁹ which covered the special installment of claims in the names of deceased detainees.⁷⁰ Based on a creative and broad interpretation of the terms 'individual' and 'person' pursuant to article 1(13) of the Provisional Rules read in conjunction with article 1(12) (delineating the scope of victims eligible for compensation) the Commission acknowledged the deceased as victims for the purposes of compensation.

The third variety of the approach contemplated above is prevalent among regional human rights bodies. Though the legal framework of the IACtHR neither explicitly, nor implicitly refers to deceased persons, its case-law identifies them as victims of violations of the American Convention on Human Rights and other regional legal instruments.⁷¹ Similarly, on many occasions the European Court of Human Rights ('the ECtHR', 'the European Court') has deemed admissible applications made on behalf of deceased individuals and has considered the latter victims of violations of certain provisions of the European Convention on Human Rights and Fundamental Freedoms ('the ECHR').⁷² An

Communication No. 146/1983 and 148 to 154/1983, U.N. Doc. Supp. No. 40 (A/40/40) at 187 (1985); *Miango v. Zaire*, Communication No. 194/1985, U.N. Doc. Supp. No. 40 (A/43/40) at 218 (1988).

⁶⁶ UN Doc. S/AC.26/1992/10 of 26 June 1992.

⁶⁷ Decision S/AC.26/1991/7/Rev.1 of 17 March 1992.

⁶⁸ Decision S/AC.26/1992/12 of 25 September 1992.

⁶⁹ Pursuant to article 17 of the Provisional Rules the Commission established different categories of claims. The additional category of individual claims related to deceased was introduced pursuant to article 6 of Decision 7 and article 1(b) of Decision 12. The two decisions read together entitle individuals to compensation for any direct loss, damage or injury, including death, as a result of Iraq's invasion and occupation of Kuwait.

⁷⁰ In conformity with article 5(a) and (c) of the Provisional Rules this special installment of claims was submitted to the Panel of Commissioners examining category 'D' claims.

⁷¹ *Aloeboetoe et al. v. Suriname*, Judgment of 10 September 1993 on Reparations and Costs, Series C No. 15, para. 54; *Garrido and Baigorria v. Argentina*, Judgment of 27 August 1998 on Reparations and Costs, Series C No. 39, para. 49; *Bámaca-Velásquez v. Guatemala*, Judgment of 22 February 2002, Reparations and Costs, Series C No. 91, para. 62; *'Mapiripán Massacre' v. Colombia*, Judgment of 15 September 2005, Merits, Reparations and Costs, Series C No. 134, paras. 136-137 and paras. 283-284; *Ituango Massacres v. Colombia*, Judgment of 1 July 2006, Preliminary Objections, Merits, Reparations and Costs, Series C No. 148, para. 355(a); *Miguel Castro-Castro Prison v. Peru*, Judgment of 25 November 2006 on Merits, Reparations and Costs, 2006, Series C No. 160; *Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*, Judgment of 5 July 2006, Preliminary Objection, Merits, Reparations and Costs, Series C No. 150, para. 60 (26)(1) and para. 119.

⁷² In the case of *Mahmut Kaya v. Turkey*, Application 22535/93, Judgment of 28 March 2000, the Court found violations of Articles 2, 3 and 13 of the ECHR in respect of the failure to protect the life of the deceased. Similarly, in the case of *Ki mir v. Turkey*, Application 27306/95, Judgment of 31 May 2005 (final as of 31 August 2005) the Court considered both the deceased and his mother, who had filed the application on behalf of

identical interpretation is observed in the case-law of the African Commission. The Commission has considered and pronounced on the merits of communications filed on behalf of deceased persons as victims of human rights abuses.⁷³

The brief comparative review shows that the majority of international adjudicative bodies favour the recognition of deceased persons as victims. However, this approach should not be transposed to the ICC automatically. Although, in general, an analogy between various (international) adjudicative systems is conceivable, if not even desirable,⁷⁴ a very careful thought must be given whether the legal regimes governing human rights jurisdictions and criminal justice systems chime together. Human rights institutions and the relevant proceedings have a significantly different nature, focus and ambit than criminal justice bodies. Institutions of the former kind pronounce on the observance of internationally recognized standards for the protection of human rights and fundamental freedoms by states and states' bodies. The primary focus of examination, albeit based on individual cases of human rights abuses, goes beyond the responsibility of the state's agents. It concentrates instead on the state's policy in the field of human rights. Accordingly, the alleged violation is considered not in the context of individual criminal responsibility, but in light of the inferences it entails about the prevalent propensity or unwillingness of the state towards its adherence to relevant international obligations.⁷⁵ Furthermore, the recognition of deceased individuals as victims before human rights bodies has an impact predominantly on the issue of reparations. Hence, the right of the

her dead son and on her own behalf, victims of violations of the Convention; see in the same vein the case of *Kiliç v. Turkey*, Application 22492/93, Judgment of 28 March 2000.

⁷³ In *Forum of Conscience v. Sierra Leone*, African Commission on Human and Peoples' Rights, Comm. 223/98 (2000), where the complaint was submitted by a non-governmental organization on behalf of executed soldiers, the Commission found a breach of the due process of law as guaranteed under article 7(1)(a) of the African Charter and declared that the execution was an arbitrary deprivation of the right to life provided for in Article 4 of the Charter. Similarly, in the *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, African Commission on Human and Peoples' Rights, Comm. 74/92 (1995) the Commission with regard to the deceased individuals found violations of their right to life, to security and to a fair trial.

⁷⁴ The comparison and analogy between different legal systems enhances the comparative legal skills of 'global jurists', which as aptly noted by commentators, are required to 'translate the foreign into the familiar' – see Vivian Grosswald Curran, 'Globalization, Legal Transnationalization and Crimes Against Humanity: The *Lipietz Case*', *American Journal of Comparative Law*, vol. 56 (2008), pp. 363-402, p. 397.

⁷⁵ The IACtHR itself noted that '[t]he international protection of human rights should not be confused with criminal justice. [...] The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible' – see *Velásquez-Rodríguez v. Honduras*, Judgment on the Merits of 29 July 1988, Series C No. 4, para. 134. Similarly, the ACHPR held that: '[t]he main goal of the communications procedure before the Commission is to initiate a positive dialogue, resulting in an amicable resolution between the complainant and the State concerned, which remedies the prejudice complained of' – see *Free Legal Assistance Group and Others v. Zaire*, African Commission on Human and Peoples' Rights, Communication 25/89, 47/90, 56/91, 100/93 (1995), para. 39.

deceased recognized by such institutions is specific, limited in object and purpose, confined to the right to compensation for the damages suffered by the deceased in their own right.

In the present context another analogy is also worth contemplating. The following suggests that the idea of deceased individuals and their posthumous legal interests is not completely unfamiliar to the ICC's statutory documents. The starting point for consideration originates in article 84 which provides for the possibility of deceased persons to be represented and their right(s) claimed on their behalf before the Court. Although the provision enshrines explicitly the posthumous right of the accused and/or the convicted person of revision of conviction or sentence, it advances the general stance that death is not a fact which necessarily precludes all rights or legal interests accorded to the individual. Such may be the right to have revision of conviction or sentence, the right to compensation or the interest in a good posthumous reputation.

History bears witness to the fact that features of such *post mortem* rights and interests date back centuries ago. An example portraying the vindication of the memory of the deceased is to be described in the nullification trial of Joan of Arc – also famous as the Maid of Orleans - canonized in 1920 as a Catholic saint. The rehabilitation trial which took place in the middle of the fifteenth century revised Joan of Arc's earlier conviction, sentence and execution for heresy and witchcraft by an ecclesiastical court in 1431. The petition for a revision of the sentence was filed in the name of the deceased by her mother and brothers before an ecclesiastical court in Paris following an official enquiry the initiative for which was ascribed to the French king Charles VII. The sentence of rehabilitation of 1456 declared the conviction for heresy and witchcraft void of effect and vindicated Joan of Arc's memory, thus, cleared her name posthumously.⁷⁶

The right of good *post mortem* reputation is a variation of the right of the deceased envisaged in article 84 of the ICC's Statute and can be discerned in the jurisprudence of the ECtHR, as well as in some common law jurisdictions.⁷⁷ The ECtHR has acknowledged this right provided that the next of kin show a legitimate material interest in

⁷⁶ See for further information <www.jeanne-darc.info>. Another example in the same vein provide the Salem Witch trials in the late 17th century in Massachusetts, USA, followed by the post-mortem exoneration of the convicted.

⁷⁷ See e.g. *Swidler & Berlin et. al v. United States*, 524 U.S. 399 (1998), <<http://law.onecle.com/ussc/524/524us406.html>>, where the US Supreme Court recognized the posthumous application of the attorney-client privilege.

their capacity as the decedent's heirs and a moral interest in having the late individual exonerated from any finding of guilt.⁷⁸ On some occasions the ECtHR has reached an even broader interpretation proclaiming that the violation itself of the right of good reputation had occurred *post mortem*.⁷⁹ Consequently, the issue of whether deceased persons are entitled to any rights and/or legal interests seems far from straightforward.⁸⁰

Given the above, the divergent approaches of the ICC's Chambers with respect to the issue of deceased individuals come to no surprise. In this respect, PTC I and Trial Chamber II ('TC II') have consistently proclaimed that deceased persons do not meet the victim criteria.⁸¹ The Chambers noted the lack of any provision in the ICC's legal framework that permits applications on behalf of deceased individuals in contrast to the explicit stipulation of rule 89(3) allowing the submission of an application by another person on behalf of the victim-applicant. Both PTC I and TC II concluded that deceased persons could not be considered as 'natural persons' as they could not give consent for the submission of the application on their behalf. Conversely, the view that 'a victim does not cease to be a victim because of his or her death' was advanced by a Single Judge of PTC

⁷⁸ *Nölkenbockhoff v. Germany*, (1991) 13 EHRR 360 87/20, Judgment of 25 August 1987, para. 33. The applicant – the heir (wife) of the deceased – claimed a posthumous violation of the presumption of innocence in respect to her late husband.

⁷⁹ *Brudnicka and others v. Poland*, . 54723/00, ECHR 2005-II, Judgment of 3 March 2005. The application was submitted by the relatives of sailors who had died in a shipwreck. The relatives claimed a violation of the sailors' right to a fair trial, in particular, with regard to their professional reputation alleging that it had been compromised posthumously through the lack of fairness of the proceedings investigating the causes for the shipwreck (*see paras. 26, 27, 29, 31*).

⁸⁰ *See* Matthew H. Kramer, 'Do Animals and Dead People Have Legal Rights?', *Canadian Journal of Law and Jurisprudence*, vol. 14, 1 (January 2001), pp. 29–54. *See also* the Individual opinion of the UN Human Rights Chamber member Christine Chanet, concerning communications Nos. 717/1996 and 718/1996 and co-signed by Mr. Fausto Pocar concerning communication No. 718/1996 in the case of *Mrs. Maria Otilia Vargas Vargas (represented by Fundacion de Ayuda Social de las Iglesias Cristianas) v. Chile*, Communication No. 718/1996, U.N. Doc. CCPR/C/66/D/718/1996/Rev. 1 (24 September 1999), according to whom '[u]nder article 16 [of the International Covenant on Civil and Political Rights], everyone has the right to recognition as a person before the law. While this right is extinguished on the death of the individual, it has effects which last beyond [...] death'.

⁸¹ *Situation in Darfur, Sudan*, PTC I, Decision on the Applications for Participation in the Proceedings, ICC-02/05-111, 6 December 2007 (*Situation in Darfur, Sudan*, PTC I, 6 December 2007), and the Corrigendum, ICC-02/05-111-Corr, 14 December 2007, paras. 35-36; *Situation in the DRC*, PTC I, Corrigendum to the Decision on the Applications for Participation in the Investigation, ICC-01/04-423-Corr-tENG, 31 January 2008, paras. 23-25 (*Situation in DRC*, PTC I, Corr., 31 January 2008), paras. 23-25; *Katanga and Ngudjolo*, PTC I, Public Redacted Version of the Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case, ICC-01/04-01/07-579, 10 June 2008 (*Katanga and Ngudjolo*, PTC I, 10 June 2008), para. 63; *Katanga and Ngudjolo*, TC II, Grounds for the Decision on the 345 Victims' Applications for Participation in the Proceedings, ICC-01/04-01/07-1491-Red-tENG, 23 September 2009 (*Katanga and Ngudjolo*, TC II, 23 September 2009), paras. 49-56, 86.

III.⁸² This stance has likewise been sustained by Trial Chamber I ('TC I')⁸³ and Trial Chamber III ('TC III').⁸⁴

The analysis of the relevant jurisprudence shows that the discrepancy in the views as regards the eligibility of deceased individuals pursuant to rule 85(a) ensues from the different starting points of the consideration of the 'natural persons' criterion employed by the various Chambers. The reasoning of PTC I and TC II implies that the moment taken into consideration by the two Chambers to determine whether the 'natural persons' prerequisite is met is at the time of the filing of the application.⁸⁵ Whereas, the wording of the decisions of PTC III, TC I and TC III suggests that these Chambers assessed the 'natural persons' requirement retrospectively, at the moment of the commission of the alleged crime - the moment of the actual occurrence of the harm.⁸⁶

Logically, when the first prerequisite under rule 85(a) is assessed at the time of the filing of the application, at that instant the deceased no longer exists as a living human being, consequently, does not fall within the purview of the 'natural persons' criterion. At the same time, when the 'natural persons' prerequisite is considered at the moment of the commission of the crime, deceased individuals qualify as victims of the alleged crime in their personal capacity. Being alive at that time, the individual personally suffered harm as a result of the crime(s) under examination.

At this point it is to be noted that, while PTC III favoured the recognition of deceased persons as victims, it nevertheless acknowledged that a deceased person cannot be a participant, thus cannot present his or her views and concerns in the proceedings.⁸⁷ Consequently, notwithstanding the lack of an express finding or any discernible consideration in this regard, actually the Chamber recognized the late individual as a

⁸² *Bemba*, PTC III, 12 December 2008, paras. 39–43. Deceased persons were recognized as victims of the case provided that '(1) the deceased *was* a natural person [emphasis added], (2) the death of the person appears to have been caused by a crime within the jurisdiction of the Court and (3) a written application on behalf of the deceased person has been submitted by his or her successor'.

⁸³ *Lubanga*, TC I, Public annex to the Decision on the applications by 7 victims to participate in the proceedings of 10 July 2009 (ICC-01/04-01/06-2035), ICC-01/04-01/06-2065-Anx2, 23 July 2009 (*Lubanga*, TC I, Public annex of 23 July 2009 to the Decision of 10 July 2009), pp. 14–16.

⁸⁴ *Bemba*, TC III, Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, ICC-01/05-01/08-807, 30 June 2010, and the Corrigendum, ICC-01/05-01/08-807-Corr, 12 July 2010 (*Bemba*, TC III, 30 June 2010, and Corrigendum, 12 July 2010), paras. 78–85.

⁸⁵ *Situation in DRC*, PTC I, Corr., 31 January 2008, para. 24; *Katanga and Ngudjolo*, TC II, 26 February 2009, para. 41.

⁸⁶ *Lubanga*, TC I, Public annex of 23 July 2009 to the Decision of 10 July 2009, p. 15; *Bemba*, TC III, 30 June 2010, and Corrigendum 12 July 2010, para. 85. In *Bemba*, PTC III, 12 December 2008, para. 43, the Chamber explicitly noted in this regard that 'the deceased father [of the victim applicant] was a natural person at the time of the crime(s) allegedly committed.'

⁸⁷ *Bemba*, PTC III, 12 December 2008, para. 44.

victim eligible for compensation (*i.e.* for the purpose of potential reparation proceedings) rather than as a victim eligible for participation in the criminal justice process for the purpose of presentation of views and concerns. This train of thought lends support to the self-evident conclusion that the recognition of victim status is not a stand-alone event or an end in itself. The determination of victim status takes place in the context and for the purpose of given proceedings, whether proceedings adjudicating the individual criminal responsibility of the alleged offender(s) or proceedings on reparations. This observation reinforces the view, posited at the outset of this chapter, that the prerequisites for victim status should not be assessed in the abstract, but should be considered in light of the nature and object of the proceedings at hand.

It is worth reiterating that rule 85 is of a universal character and, as such, governs the eligibility of a person in proceedings on the merits, as well as in specific proceedings alike. In fact, the universality of the victim definition ensues from rule 85 itself which proclaims that it serves the purpose of the Statute and the Rules. Consequently, the victim eligibility criteria are of a ‘catch-all’⁸⁸ character, which implies that they comprise equally the eligibility of a person as a victim for the purpose of participation in proceedings and the eligibility of a person as a victim for the purpose of reparation proceedings. Therefore, the ‘natural persons’ criterion (and eligibility in general) should be assessed in an ingenious way reflecting the specificities and the purpose of the proceedings at which admission is sought. The contextual interpretation of the victim definition would efface the concerns raised by some commentators that rule 85 could create the risk ‘of granting participatory rights to persons who can merely claim compensation or restitution’.⁸⁹

In passing, it should be recalled that participation in proceedings adjudicating the individual criminal responsibility of the accused (*i.e.* proceedings on the merits) and participation in reparation proceedings are two separate and distinct avenues of victims’ involvement at the ICC that are independent of one another. Accordingly, construed in light of the object and purpose of reparation proceedings, it would be logical to conclude that the purview of the ‘natural persons’ criterion pursuant to rule 85(a) encompasses deceased individuals harmed by the alleged crime(s). This conclusion is premised on the following line of reasoning. The subject-matter of reparation proceedings is the harm suffered as a result of the crime(s) under examination. Consequently, the ultimate purpose

⁸⁸ Friman, *supra* note 25, p. 490.

⁸⁹ Zappalà, *supra* note 11, p. 159.

of victims' involvement therein is the award of reparations. Since the entitlement to compensation arises at the date of the infliction of the harm, logic dictates that the eligibility as a victim for the purpose of compensation should be assessed at the moment of the commission of the crime. Hence, even if a person perishes prior to the commencement of reparation proceedings, at the relevant moment at which his or her entitlement to compensation arose – at the moment of the infliction of the harm - that person was alive and endured the damage in his or her personal capacity. It thus follows that deceased individuals would meet the victim eligibility criteria for the purpose of an award of compensation in their name. An indication in this strain is premised on the provision governing reparation proceedings - article 75 - which envisages reparations not only to victims but likewise in respect of victims. The inference advanced herewith is also in line with the jurisprudence of human rights institutions, already contemplated in detail. It is worth recalling that, according to the latter, the fact that a person is no longer alive either at the moment of the filing of the compensation claim or at the moment of the determination of the harm does not preclude the award of reparations being made in the name of the deceased. An understanding in the same vein transpires also from the relevant findings of PTC III, discussed above.

On the other hand, the fact of the harm suffered does not automatically entail that the person would be willing to intervene in proceedings adjudicating the crime(s) that inimically (and/or fatally) affected him or her and express opinion and preoccupations therein. Heedful of the purpose of victims' participation in proceedings adjudicating the individual criminal responsibility of the alleged offender(s), in order to give effect to article 68(3) the Court should assess the victim eligibility criteria not retrospectively, but at the moment of the filing of the application for participation. Consequently, persons who have passed away prior to filing an application would not meet the 'natural persons' criterion for the purpose of participation in proceedings pursuant to article 68(3), *i.e.* for the purpose of presenting views and concerns.

A challenge in this respect might pose the scenario whereby the late individual has given an express consent⁹⁰ to another person to apply for participation in his or her stead for the purpose of conveying the views and preoccupations as enunciated by the former

⁹⁰ See rule 89(3), first proposition, which reads as follows: 'An application referred to in this rule [89 'Application for participation of victims in the proceedings'] may also be made by a person acting with the consent of the victim'.

prior to death. The Court could either determine that, notwithstanding such an express consent, the late individual does not qualify as a victim for the purpose of participation, since at the moment of the filing of the application the ‘natural persons’ criterion is no longer met. Alternatively, the Court could assess the victim eligibility criteria at the moment of the express consent given by the individual prior to death for the filing of an application for participation on his or her behalf. This latter approach could lead to a positive determination pursuant to rule 85(a) regarding the late individual, which would result in an expansive interpretation of the victims’ eligibility criteria.

Logically, the latter scenario occasions the question as to the practical implications of the recognition of deceased persons as victims for the purpose of participation pursuant to article 68(3). Conceivably, individuals who pass away prior to the actual criminal justice process could not form and present opinion as regards any potential particular issues that might emerge in future proceedings and be of their concern. Thus, it is questionable whether the views and concerns related to specific issues arising in the course of the criminal process conveyed by the individual acting upon the decedent’s authorization would not in reality rest on his or her own perceptions rather than on the speculation of what the opinion of the deceased might have been had the latter still been alive.⁹¹ In other words, the question that remains is: who would in fact be the actual victim-participant?⁹²

Be that as it may, the question regarding the eligibility of deceased persons pursuant to rule 85(a) provides a vivid illustration of the fact that the ambit of the victim’s definition assessed in light of the object and purpose of participation in the criminal justice process does not necessarily coincide with the purview of the victim’s definition for the purpose of award of reparations.

⁹¹ See in support of this understanding *Katanga and Ngudjolo*, TC II, 23 September 2009, para. 54. The Chamber noted that the person acting on behalf of a deceased cannot be in a position to convey his or her views and concerns accurately.

⁹² In its interpretation of the rule 85 criteria TC III went even further by stating that ‘relevant representations from the person fatally affected’ by the alleged crime(s) could be made by another person in the course of the proceedings. At the same time, the Chamber did not require any evidence of an express consent by the late individual to be represented in proceedings for that purpose. The Chamber merely held that in order to enhance the ‘Court’s understanding of the relevant events’ an ‘appropriate individual [...] [acting on behalf of the deceased] [should be allowed] to provide the Chamber with relevant information (reflecting the views and concerns of the victim who died).’⁹² See *Bemba*, TC III, 30 June 2010, and Corrigendum, 12 July 2010, para. 83. In the view of the present author, this approach finds no basis in the Court’s legal framework. In order to provide the Chamber with relevant information reflecting the views and concerns of the victim who died, the person should be called as a witness to testify rather than being admitted as a participant.

1.3. Disappeared (Missing) Persons⁹³

Another problem that is related to the present discussion and deserves a brief consideration concerns disappeared (missing) persons. The missing person could be either deceased or alive. In the event that the disappeared is deceased, the arguments advanced above would equally apply. However, if still alive, even though his or her whereabouts are unknown, the disappeared meets the ‘natural persons’ criterion. The question which comes into light is whether victim status could be accorded to such an individual in the absence of an explicit will for his or her recognition as victim before the Court. Premised on the wording of rule 89(3) the reasonable inference should be that a disappeared person who meets the rule 85 criteria could not be granted victim status, unless an express will in this regard is manifested.

In case the missing person is a child it is presumed that he or she cannot form the required will ‘by reason of [...] physical and mental immaturity’⁹⁴. Consequently, the child’s rights and legal interests must be safeguarded and represented by another person. Hence, victim status could be claimed on behalf of the disappeared child through other persons.⁹⁵

With respect to a disappeared individual who is disabled two different scenarios come to the fore. If that person suffers physical and/or mental disability which does not affect the capacity to form will and express it accordingly, victim status could be claimed on behalf of the disappeared with his or her express consent. In case the missing person has diminished mental capacity and/or physical impairment which affect(s) his or her powers of discernment, victim status could be claimed on behalf of the individual by another person (such as a legal guardian).

A swift glance at the ICC’s jurisprudence shows that the issue of disappeared/missing persons has not yet been addressed in detail. The few sporadic references made by the Chambers have contemplated the disappearance of an individual

⁹³ The wording ‘disappeared’ and ‘missing’ are used interchangeably throughout the text.

⁹⁴ Preamble to the Declaration of the Rights of the Child (1959) (G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. (16) at 19, U.N. Doc. A/4354.

⁹⁵ The question emerges of whether a person who does not have a formal status in relation to the child (such as a parent or legal guardian) could represent the child and properly decide on the best way to safeguard his or her legal interests. The issue of children’s representation has been tackled differently by the Pre-Trial Chambers, on the one hand, and TC I, on the other. *See e.g. Situation in Uganda*, PTC II, 14 March 2008, para. 7; *Abu Garda*, PTC I, 25 September 2009, para. 88; *Lubanga*, TC I, Decision on the applications by victims to participate in the proceedings, ICC-01/04-01/06-1556, 15 December 2008 (*Lubanga*, TC I, 15 December 2008), para. 64 *et seq.*

as a fact inflicting harm to the family members which entitles the latter to claim victim status in their own right.⁹⁶ With regard to the recognition of disappeared as victims themselves, the Court has ruled that applications on their behalf cannot be considered due to the lack of consent required under rule 89(3).⁹⁷

2. Legal Persons

The introduction of legal entities⁹⁸ as the second group of victims pursuant to rule 85(b) grants an independent standing of juridical persons in their own right before the ICC. This new class of victims on the international criminal justice scene is likely to originate various concerns in practice. Any additional category of victims entails the possibility for a potential increase in the number of persons appearing before the Court.⁹⁹ At the same time, the fact that legal entities often sustain harm as a result of violations of international law must not be neglected, but should be given due consideration.¹⁰⁰

The wording of rule 85(b) advances the conclusion that the drafters have been heedful of both concerns.¹⁰¹ This legal text reveals an intention towards achieving a balance between two concurring goals: safeguarding the expeditiousness of the proceedings (by preventing myriad victims from appearing before the Court) and acknowledging the existence of a separate, wide category of persons harmed as a result of crimes within the jurisdiction of the Court.¹⁰²

⁹⁶ *Situation in Darfur, Sudan*, PTC I, 6 December 2007, para. 35; *Situation in DRC*, PTC I, Corr. 31 January 2008, paras. 24 and 85.

⁹⁷ *See Situation in Darfur, Sudan*, PTC I, 6 December 2007. Likewise, in the *Situation in Uganda*, PTC II, Decision on Victims' Applications for Participation, ICC-02/04-172, 21 November 2008, the Chamber rejected an application submitted on behalf of a disappeared person on the grounds that the latter was neither a child, nor disabled, thus did not meet the rule 89(3) requirements (paras. 214–217).

⁹⁸ According to Black's Law Dictionary, a legal person is a fictitious/legal/moral person, as well as 'artificial person'. The latter is referred to as 'an entity, such as a corporation, created by law and given certain legal rights and duties of a human being; a being, real or imaginary, who for the purposes of legal reasoning is treated more or less as a human being.'

⁹⁹ Cohen, *supra* note 22, p. 366.

¹⁰⁰ *See* article 8(2)(b); Dinah L. Shelton, 'Reparations for Victims of International Crimes' in Dinah Shelton (ed.) *International Crimes, Peace and Human Rights: The Role of The International Criminal Court*, Transnational Publishers, 2000, pp. 137-147, at pp. 142-143; M. Cherif Bassiouni, 'International Recognition of Victims' Rights', *Human Rights Law Review*, vol. 6, 2 (2006), pp. 203-279, p. 243, and Baumgartner, *supra* note 22, p. 420.

¹⁰¹ Rule 85(b) explicitly confines the group of eligible victims to juridical persons falling within the notion of 'organization' and/or 'institution'.

¹⁰² *See* Silvia Alejandra Fernández de Gurmendi and Håkan Friman, 'The Rules of Procedure and Evidence of the International Criminal Court', *Yearbook of International Humanitarian Law*, vol. 3 (2000), pp. 289-336, p. 314 for an indication of the 'major and fundamental division between those who wanted a definition of victims confined to natural persons and those who wanted to include legal entities as well'.

2.1. Victim Definitions Lacking Reference to Legal Persons

The introduction of legal persons into the notion of victims before the ICC broadens the conventional concept of ‘victim’ found in the constitutive documents of the *ad hoc* tribunals and some internationalized courts. The ICTY and the ICTRs’ legal frameworks, as well as the normative basis of the Special Court for Sierra Leone (‘the SCSL’) do not envisage legal persons into the victim definition. Although the wording ‘person’ may have two different interpretations: restrictive (confined to natural persons) and broad (encompassing legal entities), the review of the constitutive documents of the *ad hoc* and the hybrid tribunal favours the narrow connotation.

Pursuant to the Rules of Procedure and Evidence of the ICTY and the ICTR the term ‘person’ is used both in the victim definition and in the definitions of the suspect and the accused.¹⁰³ The accused and the suspect can only be natural persons, according to the explicit stipulation of article 6 of the ICTY’s Statute and article 5 of the ICTR’s Statute defining the tribunals’ personal jurisdiction. Therefore, the rational conclusion is that the general usage of the word ‘person’ in the tribunals’ legal framework is in the restrictive meaning of this term and refers to natural persons only.

A similar inference is to be made with regard to the substance and ambit of the term ‘person’ within the SCSL’s legal framework. Unlike the two *ad hoc* tribunals established by resolutions of the UN Security Council, the SCSL is a treaty-based court of mixed jurisdiction. Accordingly, the applicable law of this internationalized court includes international as well as Sierra Leonean national law to the extent explicitly provided for in its statutory documents.¹⁰⁴ Neither the constitutive instruments of the SCSL, nor the relevant Sierra Leonean legal framework¹⁰⁵ relate the word ‘person’ to legal entities. On the contrary, several provisions in the SCSL’s Rules of Procedure and Evidence explicitly employ the word ‘entity’ when envisaging legal persons.¹⁰⁶ In addition, pursuant to article 2 of the Sierra Leonean Criminal Procedure Act of 1965 which gives interpretation of

¹⁰³ See rule 2 of the ICTY and ICTRs’ Rules of Procedure and Evidence.

¹⁰⁴ See the Report of the UN Secretary-General on the establishment of a Special Court for Sierra Leone, Document S/2000/915, and articles 1, 5, 14(2) of the SCSL’s Statute on the nature of SCSL and the applicability of domestic legislation.

¹⁰⁵ See the Criminal Procedure Act of 1965 as an applicable national legislation pursuant to article 14(2) of the SCSL’s Statute.

¹⁰⁶ See rules 6(a), 70(b), (c) and (d) of SCSL’s Rules of Procedure and Evidence.

certain terms, the word ‘person’ is used in the context of natural persons only. The definition of a ‘corporation’ contained in the same provision does not make recourse to the word ‘person’.¹⁰⁷ Furthermore, the SCSL in its jurisprudence has consistently ruled that “‘victims’ means and includes victims of sexual violence, torture, as well as all persons who were under the age of 15 at the time of the alleged commission of the crime.”¹⁰⁸ The reference to age, as well as to crimes the commission of which involves natural persons only both in terms of perpetrator and victim unequivocally shows that the Court’s interpretation is confined to natural persons.

An additional argument in the same vein ensues from the fact that in the proceedings before these tribunals victims appear solely in their capacity as witnesses.¹⁰⁹ The witness capacity due to notorious reasons is attributable to natural persons only. Hence, the overall conclusion to be advanced is that the ambit of the word ‘person’ in the discussed victim definitions does not encompass legal entities.

The legislative approach found in the legal framework of another hybrid tribunal – the Special Tribunal for Lebanon (‘the STL’) – also merits a brief reference. Although STL’s Statute and Rules of Procedure and Evidence delineate a victims’ participation scheme akin to some extent to the one provided for in the ICC’s legal framework,¹¹⁰ rule 2(A) of the Rules of Procedure and Evidence explicitly confines the victim definition to natural persons.

The recognition of juridical entities as victims at the international level also proves novel compared to the concept of ‘victim’ enshrined in basic international legal instruments, such as the Declaration of Basic Principles of Justice for Victims of Crime

¹⁰⁷ See the 1965 Criminal Procedure Act, Part V ‘Special Trials. Trial of Corporations’ – articles 206–209 envisaging corporate criminal liability.

¹⁰⁸ See the Decisions of the SCSL’s Trial Chamber on the Prosecutor’s motions for immediate protective measures for witnesses and victims and for non-public disclosure and the orders annexed to them in: *The Prosecutor v. Samuel Hinga Norman*, Case SCSL-2003-08-PT, 23 May 2003; *The Prosecutor v. Alex Tamba Brima aka Tamba Alex Brima, aka Gullit*, Case SCSL-2003-06-PT, 23 May 2003 and *The Prosecutor v. Moinina Fofana*, Case SCSL-2003-11-PD, 16 October 2003.

¹⁰⁹ See articles 15, 18, 20 and 22 of the ICTY’s Statute and rules 34, 39, 69, 75, 96 of its Rules of Procedure and Evidence; articles 14, 17, 19, 21 of the ICTR’s Statute and rules 34, 69, 75 of its Rules of Procedure and Evidence, as well as articles 15(2), 16(4), 17(2) of the SCSL’s Statute and rules 26bis, 34, 39, 40, 40bis, 69, 75, 105 of the SCSL’s Rules of Procedure and Evidence. Victims cannot claim compensation before the *ad hoc* and the hybrid tribunal – this possibility is ruled out by virtue of rule 106 of the Rules of Procedure and Evidence of each of the two *ad hoc* tribunals and rule 105 of the SCSL’s Rules of Procedure and Evidence. Thus, victims have no other standing before these courts than witnesses.

¹¹⁰ See, for example, article 17 of the STL’s Statute (S/RES/1757) and rules 50, 51, 86 and 87 STL’s Rules of Procedure and Evidence (STL/BD/2009/01/Rev. 2).

and Abuse of Power ('the Basic Principles of Justice for Victims')¹¹¹ and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ('the Basic Principles and Guidelines on Remedy and Reparation').¹¹² Both employ the term 'persons' without an explicit inclusion of legal entities.¹¹³ The contextual analysis of the relevant provisions warrants the conclusion that this omission is not fortuitous.

Article A (1) of the Basic Principles of Justice for Victims uses the words 'individual', 'physical', 'mental', 'emotional', all of them attributable to natural persons. Similarly, article 10 of the Basic Principles and Guidelines on Remedy and Reparation proclaims the victims' physical and psychological well-being, which advances the conclusion that the concept of victims is confined to natural persons. Further, article 15 of the Basic Principles and Guidelines on Remedy and Reparation introduces the term 'legal persons' as an example of entity liable for reparations to victims. This express use of the word 'legal' in conjunction with 'persons' is another unambiguous indication that the scope of the notion 'persons' used elsewhere in the Basic Principles and Guidelines on Remedy and Reparation is confined to natural persons.¹¹⁴

2.2. Approaches Recognizing Legal Entities as Victims (Damaged Persons) at the International Level

Notwithstanding the examples which lack reference to juridical persons, to conclude that the acknowledgement of legal entities as victims is unique and exclusively characteristic of the ICC would not only be hasty, but also incorrect. In fact, this legislative approach chimes to a great extent with the legal texts of another criminal justice body - the East Timor's hybrid court, which recognizes juridical persons as victims and in a similar way expressly confines them to 'an organization or institution directly affected by a criminal

¹¹¹ Adopted on 29 November 1985 pursuant to UN General Assembly Resolution A/RES/40/34.

¹¹² Adopted on 19 April 2005 by Resolution 2005/35, E/CN.4/RES/2005/35.

¹¹³ See in the same vein Bassiouni, *supra* note 100, p. 243.

¹¹⁴ See in the same spirit Theo van Boven, 'Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines' in C. Ferstman *et al.* (eds.) *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity. Systems in Place and Systems in the Making*, Martinus Nijhoff, 2009, p. 35, according to whom the 'victim' definition 'only mentions natural persons and not legal persons'.

act.’¹¹⁵ Similarly, although the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea (‘the ECCC’) lacks provisions stipulating juridical persons as victims, according to the glossary to the ECCC’s Internal Rules the term ‘victim’ encompasses legal entities as well.¹¹⁶

The broadening of the ambit of the victim definition through the adoption of rule 85(b) is also in line with other recent developments on a larger international scale. Legal persons are acknowledged as victims before supranational, regional, bilateral and multilateral adjudicative institutions. The following approaches are to be discerned: 1) recognition by the relevant legal framework; 2) recognition by virtue of the respective jurisprudence; 3) recognition envisaged in legislative initiatives and projects under consideration by the international community. The tendency towards the acknowledgement of juridical persons as victims does not originate predominantly in the realm of international criminal law, but is observed in the context of violations of humanitarian and human rights law. Nevertheless, it entails the general inference of an increasing drift towards the recognition of legal entities as victims (damaged entities) at the supranational level.

2.2.1. Legislative Recognition

The roots of such a tendency can be traced back to the beginning of the twentieth century. A glance at the aftermath of World War I reveals that in the 1920s certain legal entities were granted plaintiff status before the USA-Germany Mixed Claims Commission. This legal approach is an example of an implied legislative recognition of juridical entities as victims (damaged entities). The legal framework does not elucidate the ambit of the notion ‘American national’ which delineates the persons entitled to file claims before the Commission.¹¹⁷ Nevertheless, legal entities are implicitly covered by this term. This

¹¹⁵ See section 1(x) of the General provisions of the Transitional Rules of Criminal Procedure in East Timor.

¹¹⁶ Notably, the ECCC differs from all other international(ized) criminal justice bodies contemplated above. Its statutory documents recognize the right of persons to participate in their capacity *qua* victims as civil parties before the Court - see e.g. article 36 new of the Law on the Establishment of the ECCC (NS/RKM/1004/006 as amended on 27 October 2004), as well as rule 23 of the ECCC’s Internal Rules (Rev. 5, as revised on 9 February 2010).

¹¹⁷ Pursuant to Administrative Decision I of the Commission ‘American national’ is ‘a person wheresoever domiciled owing permanent allegiance to the United States of America’, Reports of International Arbitral Awards, vol. VII, United Nations, 2006, p. 21.

inference is premised on the wide interpretation made by the Commission of the notion ‘nationals’ in article 1 of the Agreement of August 10, 1922 as including both natural and juridical persons, such as corporations and companies.¹¹⁸

An illustration of an explicit legislative acknowledgment of legal persons as victims of violations of international law dating back several decades after the end of World War II is to be found in the compensation scheme pursuant to the Swiss Banks Holocaust Litigation and Settlement.¹¹⁹ Both the Class Action Settlement Agreement¹²⁰ and the Governing Rules of the Claims Reparation Process stipulate a broad victim definition, which besides individuals expressly designates certain types of legal entities as falling within its ambit.¹²¹

Other recent examples of an explicit legislative recognition of legal persons as victims at the international level are to be described in the legal frameworks of several regional human rights institutions and bilateral adjudicative bodies. The constitutive documents of both the ECtHR¹²² and the Commission on Human Rights for Bosnia and

¹¹⁸ See Decision of the Umpire in the case of *Agency of Canadian Car and Foundry Company, Ltd. (United States) v. Germany (Sabotage Cases)*, October 30, 1939 and the Supplemental Opinion of the American Commissioner, October 30, 1939 in *Mixed Claims Commission (United States v. Germany) constituted under the Agreement of August 10, 1922, extended by Agreement of December 31, 1928*, Reports of International Arbitral Awards, vol. VIII, United Nations, 2006, p. 465, where the American Commissioner opined that ‘[i]t is clear [...] that the term “national” [is] broader than “citizen”, and being used “in its broadest possible sense” includes corporations. This is in accord with the decisions of the USA Supreme Court in *Society for the Propagation of the Gospel v. New Haven* [reference omitted]; *United States v. Northwestern Express Company* [reference omitted]’. See also *American-Hawaiian Steamship Company (United States) v. Germany*, September 30, 1926, in Reports of International Arbitral Awards, vol. VIII, United Nations, 2006, pp. 26-30; *Timandra Shipping Company (United States) v. Germany*, January 5, 1927 in Reports of International Arbitral Awards, vol. VIII, United Nations, 2006, p. 30, in the part recognizing the *locus standi* of the legal entity as claimant before the Commission. See also Wilhelm Kiesselbach, *Problems of the German-American Claims Commission*, Carnegie Endowment for International Peace, 1930, p. 112.

¹¹⁹ Known as the *Swiss Banks Settlement: In re Holocaust Victim Assets Litigation*, a series of class action lawsuits filed in several US federal courts in 1996-1997 against certain Swiss banks and other entities, alleging that Swiss financial institutions collaborated with and aided the Nazi Regime by knowingly retaining and concealing assets of Holocaust victims, and by accepting and laundering illegally obtained Nazi loot and profits of slave labor. All the cases were consolidated before Judge Edward R. Korman of the US District Court for the Eastern District of New York, <www.swissbankclaims.com/InsuranceClaims.aspx>. See also Judah Gribetz and Shari C. Reig, ‘The Swiss Bank Holocaust Settlement’ in C. Ferstman *et al.* (eds.) *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity. Systems in Place and Systems in the Making*, Martinus Nijhoff, 2009, pp. 115-142.

¹²⁰ Settlement Agreement in the Holocaust Victim Assets class action litigation, 26 January 1999, which laid down the foundations of the Claims Resolution Process before the Claims Resolution Tribunal.

¹²¹ Such as, corporation, partnership, sole proprietorship, unincorporated association, organization which were or were believed to be Jewish, Romani, etc. - see para. 1 ‘Definitions’, p. 4 of the Class Action Settlement Agreement, as well as articles 7 and 46(20) in conjunction with article 46(6) of the Governing Rules. See also article 46(26) according to which ‘Victim or Target of Nazi Persecution [...] : means any person or entity persecuted or targeted for persecution by the Nazi regime [...]’.

¹²² According to article 1 of Protocol I to the ECHR of 20 March 1952 ‘[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions’. Article 34 of the ECHR stipulates the right of non-governmental

Herzegovina¹²³ provide for the protection of certain rights of legal persons (including non-governmental organizations) and entitle them, accordingly, to claim violations of such rights.¹²⁴ The same approach is followed in the statutory documents of the Inter-American system, which explicitly recognize legal persons as victims of violations of the legal instruments for the protection of human rights at the Inter-American level.¹²⁵

The legal framework of some bilateral and multilateral institutions also envisages legal persons as victims. The constitutive documents establishing the Ethiopia-Eritrea Claims Commission¹²⁶ and the Iran-United States Claims Tribunal¹²⁷ include legal entities in the notion ‘nationals’ used in the legal texts, which acknowledges them as victims before the respective adjudicative body.¹²⁸ In a similar way, the legal system of the UN

organizations to file an individual application claiming to be the victim of a violation of the rights set forth in the ECHR or the protocols thereto. See also rules 36 and 45(2) of the ECtHR’s Rules.

¹²³ Articles 5(2) and 8(1) of the Agreement on Human Rights provide for the right of non-governmental organizations to claim to be the victim of certain violations of human rights falling within the scope of the Agreement. See also rule 32 of the Human Rights Chamber’s Rules of Procedure.

¹²⁴ See *Dombo Beheer B.V. v. The Netherlands*, Application 14448/88, Judgment of 27 October 1993, *Immobiliare Saffi v. Italy*, Application 22774/93, Judgment of 28 July 1999, and *Comingersoll S.A. v. Portugal*, Application 35382/97, Judgment of 6 April 2000 where the Court with respect to the applicant companies found violations of article 6(1) of the ECHR; see the case of *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria*, Application 15153/89, Judgment of 19 December 1994, where the Court with respect to the applicant legal person found violations of articles 10 and 13 of the ECHR; see also the case of *Freedom and Democracy Party (ÖZDEP) v. Turkey*, Application 23885/94, Judgment of 8 December 1999, where the Court found a violation of article 11 of the ECHR.

¹²⁵ Article 23 of the Rules of Procedure of the Inter-American Commission on Human Rights entitles ‘any person or group of persons or nongovernmental entity legally recognized in one or more of the Member States of the OAS’ to submit petitions to the Commission on their own behalf concerning alleged violations of a human right. See further articles 48-51 and article 61 of the American Convention on Human Rights.

¹²⁶ Established pursuant to article 5(1) of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea concluded on 12 December 2000 with the mandate to decide all claims for loss, damage or injury by the government of one of the parties to the Agreement against the other, and ‘by nationals (including both natural and juridical persons) of one party against the [g]overnment of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the [present] Agreement [...] and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law’.

¹²⁷ Established by virtue of the Algerian Claims Settlement Declaration (Agreement) of 19 January 1981 (concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran) with the purpose to serve as one of the measures to resolve the crisis in the relations between Iran and the USA arising out of the detention of 52 US nationals at the US Embassy in Tehran (commenced in November 1979) and the subsequent freeze of Iranian assets by the USA.

¹²⁸ Article 5(8) of the Ethiopia-Eritrea Agreement explicitly provides that ‘[c]laims shall be submitted to the Commission by each of the parties on its own behalf and on behalf of its nationals, including both natural and juridical persons.’ Similarly, pursuant to article 7(1) of the Algerian Claims Settlement Agreement: ‘[a] national of Iran or of the United States [...] means [...] (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock’.

Compensation Commission acknowledges certain types of juridical entities as damaged persons entitled to file claims before the Commission.¹²⁹

2.2.2. Case-by-Case Acknowledgment

The case-by-case acknowledgment of juridical persons as victims (damaged entities) can be observed in the jurisprudence of the Permanent Court of International Justice,¹³⁰ the International Court of Justice ('the ICJ'), as well as the African Commission. Such an approach dating back to the late 1920s is to be discerned in the Judgment of the Permanent Court of International Justice in the *Factory of Chorzów* case.¹³¹ The Court recognized a company as a damaged entity which sustained harm as a consequence of a state's breaches of international obligations. Similarly, the ICJ identified legal persons as victims of infringements of international law.¹³² The Court declared the entitlement of both natural and juridical persons to compensation for the damages sustained.¹³³ Hence, the unambiguous inference is that legal entities are recognized as victims of violations of international law in the jurisprudence both of the ICJ and its predecessor – the Permanent Court of International Justice. Likewise, legal persons have been referred to as victims of certain violations of the African Charter by the African Commission.¹³⁴

¹²⁹ Article 1(12) of the Provisional Rules envisages as 'claimant' any 'corporation or other private legal entity, public sector entity, Government or international organization that files a claim with the Commission'. It is further clarified in article 1(13) of the Provisional Rules that the notion of '[p]erson or [b]ody' includes, *inter alia*, a 'corporation or other private legal entity, public sector entity, Government, or international organization'. The claims of corporations and other legal entities are classified as an additional category of claims (the so called category 'E' claims) by virtue of Governing Council's Decision S/AC.26/1991/7/Rev.1 of 17 March 1992. See also articles 5(1)(b), 5(1)(c), 5(3) and 38 of the Provisional Rules.

¹³⁰ Established in 1920 in conformity with article 14 of the Covenant of the League of Nations. It functioned from 1922 until 1946.

¹³¹ Case concerning the *Factory of Chorzów* (Claim for Indemnity/Jurisdiction), Judgment 8, 26 July 1927, the Interpretation of the Judgment of 16 December 1927 and Judgment 13 of 13 September 1928.

¹³² See e.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, paras. 114–138.

¹³³ *Ibid.*, paras. 152–153.

¹³⁴ *Huri-Laws v. Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 225/98 (2000). The Commission deemed admissible the communication submitted on behalf of the non-governmental organization Civil Liberties and found a violation of its right to property enshrined in article 14 of the African Charter.

2.2.3. Legislative Proposals

The concept of legal entities as victims of certain violations of international law has originated legislative proposals and activities. An illustration of the recent impetus with which this idea emerges on the international legal horizon is the initiative undertaken by the International Law Association through the International Committee on Compensation for Victims of War.¹³⁵ The term ‘victim’ introduced in the Draft Declaration of International Law Principles on Compensation for Victims of War (Substantive Issues) is intended to designate natural and legal persons, who suffer harm as a result of violations of international law.¹³⁶ The Draft Model Statute of an *ad hoc* International Compensation Commission also entitles legal entities to claim compensation before the Commission.¹³⁷

2.3. Interpretation of Rule 85(b)

The gradual and consistent acknowledgment of legal entities as victims of violations of international law lends support to the approach of the ICC’s statutory framework towards legal persons. Hitherto, the Court has been concerned predominantly with matters related to natural persons in their capacity *qua* victims due to the prevalent majority of applications filed by individuals. Thus, the jurisprudence on the second group of victims remains scarce. As applications stemming from organizations and/or institutions have

¹³⁵ Draft Declaration on International Law Principles on Compensation for Victims of War (Substantive Issues) prepared by Professor Rainer Hofmann (co-Rapporteur), Draft Declaration on International Law Principles on Reparation for Victims of Armed Conflict (Procedural aspects) and Draft Model Statute of an *Ad Hoc* International Compensation Commission prepared by Shuichi Furuya, all in the ‘Report on Compensation for Victims of War’, ILA’s Conference, Rio de Janeiro, 2008.

¹³⁶ See draft article 4(1), sentence 1 of the Draft Declaration on International Law Principles on Compensation for Victims of War (Substantive Issues).

¹³⁷ See draft article 2(3) of the Draft Model Statute of an *ad hoc* International Compensation Commission and the commentary to the cited provision. According to the latter ‘victims [...] encompass legal persons as well as natural persons.’

been an exception rather than a rule,¹³⁸ the Court has touched upon the criteria for legal entities on a limited number of occasions.¹³⁹

The Court has made so far a scant reference to the identification requirements in respect to legal persons. It has ruled that any constitutive document in accordance with the law of the respective country will be taken into account, as well as any document proving that the person submitting the application on behalf of the organization or institution has the right to make such a request. That is, the person must demonstrate that he or she has *locus standi* to do so.¹⁴⁰ On the whole, the ICC proclaimed that the criteria pertaining to the identity of a victim-applicant equally apply to the person acting on behalf of an organization or institution. A thorough analysis of the criteria under rule 85(b) and juxtaposition between the requirements applicable to the two groups of victims under rule 85 is not yet to be found in the Court's jurisprudence. Nevertheless, as noted earlier, the principles underpinning the eligibility criteria pursuant to rule 85(a) and (b) are identical. Thus, the requirements applicable to the two groups of victims concur to a very high extent.

The entitlement of legal persons to victim status must be differentiated from another separate and distinct matter – the question related to legal entities as persons bearing criminal responsibility. As the ICC's drafting history suggests, the issue concerning the criminal liability of juridical persons was thoroughly considered by the Court's founders.¹⁴¹ Draft articles were elaborated stipulating both the criminal

¹³⁸ To illustrate: in the *Situation in DRC*, PTC I, Corr., 31 January 2008, only one application was filed on behalf of a legal person (a school). Similarly, in *Bemba*, PTC III, 12 December 2008, one application was submitted on behalf of a legal entity (a church). Likewise, in *Katanga and Ngudjolo*, PTC I, 10 June 2008, only two applications were filed on behalf of a legal entity. As it can be seen from the Grounds for the Decision in *Katanga and Ngudjolo*, TC II, 23 September 2009, only two applications were filed on behalf of legal entities (two primary schools). In *Lubanga*, TC I, 15 December 2008, only one application was submitted on behalf of a legal person (a school).

¹³⁹ E.g. *Situation in DRC*, PTC I, Corr., 31 January 2008; *Katanga and Ngudjolo*, PTC I, 10 June 2008; *Abu Garda*, PTC I, Decision on the 52 Applications for Participation at the Pre-Trial Stage of the Case, Public Redacted Version, ICC-02/05-02/09-147-Red, 9 October 2009 (*Abu Garda*, PTC I, 9 October 2009); *Lubanga*, TC I, 18 January 2008.

¹⁴⁰ *Bemba*, PTC III, 12 December 2008; *Abu Garda*, PTC I, 9 October 2009.

¹⁴¹ Per Saland, 'International Criminal Law Principles' in Roy S. Lee (ed.) *The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results*, Kluwer Law International, 1999, pp. 189-216, p. 199 *et seq.*; Andrew Clapham, 'The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in M.T. Kamminga and S. Zia-Zarifi (eds.) *Liability of Multinational Corporations Under International Law*, 2000, Kluwer Law International 2000, pp. 139-195, p. 146; Desislava Stoitchkova, *Towards Corporate Liability in International Criminal Law*, School of Human Rights Research Series, vol. 38, pp. 13-16.

responsibility of legal entities and the applicable penalties.¹⁴² The idea of corporate criminal liability at the time of the drafting of the Statute was neither novel, nor alien to a number of domestic legislations. Thus, the division of opinions on this matter was conceivable. Nevertheless, in the final version of the legal texts the proposals envisaging the criminal liability of legal entities were discarded. Eventually, the drafters embraced the initial understanding¹⁴³ that the personal jurisdiction of the first permanent criminal court will extend to natural persons only.¹⁴⁴

III. The Second Criterion: Harm

Harm denotes the second criterion pursuant to rule 85. The constitutive documents of the ICC refer to ‘loss’, ‘injury’ and ‘damage’ as alternatives of the word ‘harm’, though they all lack legal definition. Thus, the interpretation of the exact substance and connotation of these notions is left to the discretion of the Court.

Rule 85(a) and (b) further differentiate between the harm eligible for natural persons *vis-à-vis* juridical persons. The type of harm as regards legal entities is confined to direct harm which is expressly related to certain types of property for humanitarian purposes. By contrast, no restriction of this kind is envisaged for the harm suffered by natural persons. This again illustrates the drafters’ cautious approach towards the introduction of juridical persons as a new category of victims before the Court. In addition to restricting the eligible legal persons to two types only, the ICC’s founders further narrowed the ambit of the second group of victims through the explicit, albeit not exhaustive, limitations of the relevant harm contemplated above.

¹⁴² See draft article 23(5) and (6) of the Draft Statute for the International Criminal Court in ‘The Report of the Preparatory Committee on the Establishment of an International Criminal Court’, Addendum, UN Doc. A/CONF.183/2/Add.1.

¹⁴³ See draft article 25 of the Draft Statute for an International Criminal Court (Annex to the Report of the Committee on International Criminal Jurisdiction, U.N. GAOR, 7th Sess., Supp. 11, at 21-25, U.N. Doc. A/2136 (1952)) and draft article 25 of the Revised Draft Statute for an International Criminal Court (Annex to the Report of the 1953 Committee on International Criminal Jurisdiction, U.N. GAOR, 7th Sess., Supp. 12, at 21, U.N. Doc. A/26645 (1954) in M. Cherif Bassiouni, *The Statute of the International Criminal Court: A Documentary History*, 1998, Transnational Publishers 1998.

¹⁴⁴ See article 25(1) of the Rome Statute.

1. Definition

Apart from such limitations, no other guidelines are provided for as to the nature and scope of the damages sustained by the two groups of victims. The lack in the ICC's statutory documents of a definition of the notion of 'harm' and of any benchmark as to its exact substance, with regard to natural persons in particular, warrants reference to other legal instruments. On several occasions¹⁴⁵ recourse was made by the Court to the ordinary meaning of the word 'harm',¹⁴⁶ as well as to articles 8 and 9 of the Basic Principles and Guidelines on Remedy and Reparation as appropriate guidance in the assessment of the nature and scope of the eligible harm. Admittedly, the reference to the Basic Principles and Guidelines on Remedy and Reparation is construed in the context of harm suffered by natural persons, because, as previously observed, the Basic Principles' victim definition does not envisage legal entities.

Similar guidance for the interpretation of the second criterion can be found in a recent project of the International Law Association. The draft definition of harm in the Draft Declaration of International Law Principles on Compensation for Victims of War (Substantive Issues) overlaps to a great extent with the description of harm contained in article 8 of the Basic Principles and Guidelines on Remedy and Reparation.¹⁴⁷ However, both legal texts suffer similar shortcomings. Instead of clarifying the essence of harm they merely enumerate various types of damages as falling within its ambit. Albeit such an approach may suffice in providing a 'stipulative definition'¹⁴⁸ for the purposes of the particular legal instruments, it fails to suggest a general full meaning of the term 'harm'.

A different way in explaining the notion of harm by presenting its distinctive features rather than solely listing some of its manifestations is to portray it as 'any inimical consequence [effect, impact] of an act or omission, constituting an illegal

¹⁴⁵ *E.g. Lubanga*, TC I, 18 January 2008, para. 92; *Lubanga*, TC I, 15 December 2008, para. 48.

¹⁴⁶ The Appeals Chamber referred to the Shorter Oxford English Dictionary and Black's Law Dictionary and concluded that the ordinary meaning of harm denotes hurt, injury and damage, carries the same meaning in the ICC legal texts, denoting injury, loss, or damage and is the meaning of 'harm' in rule 85 - *Lubanga*, Appeals Chamber, 11 July 2008, para. 31.

¹⁴⁷ Article 8 of the Basic Principles and Guidelines envisages 'physical or mental injury, emotional suffering, economic loss, or impairment of [...] fundamental legal rights' as types of harm. Draft article 4(1), sentence 2 of the Draft Declaration on International Law Principles on Compensation for Victims of War (Substantive Issues), refers to 'physical or mental injury, emotional suffering or economic loss' as included in the notion of harm.

¹⁴⁸ According to Black's Law Dictionary stipulative definition is '[a] definition that, for [the] purposes of the document in which it appears, arbitrarily clarifies a term with uncertain boundaries or that includes or excludes specified items from the ambit of the term'.

conduct, on the physical [material], mental, economic and/or social wellbeing [condition] of a person'. The definition advanced herewith is intended only to promote an alternative approach in determining harm distinct from those contemplated above without claiming exhaustiveness or uniqueness.¹⁴⁹

2. Types of Harm

2.1. Harm Suffered by Natural Persons

With respect to the specific manifestations of harm, the Court has entertained the view that the recoverable damages suffered by natural persons are both direct and indirect. According to the ICC's jurisprudence, the harm may also be material, physical and emotional (mental) - physical and psychological suffering, injuries, trauma - as well as economic loss and substantial impairment of fundamental rights.¹⁵⁰ A wide range of facts and events have been identified as causing harm to the individual, such as, *inter alia*, the loss of family members, enslavement and detention;¹⁵¹ incommunicado detention accompanied by beating and other severe mistreatment, detention in an isolation cell in which a person is denied medical treatment and is given limited access to food;¹⁵² exposure to fire and/or random shooting, as well as witnessing events of an exceedingly violent and shocking nature;¹⁵³ recruitment of a child soldier;¹⁵⁴ pillaging and destruction of property.¹⁵⁵ It is of paramount importance that in order for the second eligibility

¹⁴⁹ An attempt for clarification of 'harm' along the same lines may be detected in para. 4 of the commentary to draft article 4(1), sentence 2 of the Draft Declaration on International Law Principles on Compensation for Victims of War (Substantive Issues), which refers to harm as 'the negative outcome resulting from the comparison of two conditions of one person'. Another explanative definition of harm is suggested by Joel Feinberg, *Harm to Others*, Oxford University Press, 1984, p. 215, according to whom harm represents 'those states of setback interest that are the consequence of wrongful acts or omissions of others'. According to Black's Law Dictionary, harm is 'material or tangible detriment'.

¹⁵⁰ *Situation in DRC*, PTC I, 17 January 2006; *Kony et al.*, PTC II, 10 August 2007; *Bemba*, PTC III, 12 December 2008; *Lubanga*, TC I, 18 January 2008; *Lubanga*, Appeals Chamber, 11 July 2008; *Kony et al.*, Appeals Chamber, Judgment on the Appeals of the Defence against the Decisions of PTC II of 14 March 2008 on Victims' Applications for Participation in the Case, ICC-02/04-01/05-371, 23 February 2009 (*Kony et al.*, Appeals Chamber, 23 February 2009).

¹⁵¹ *Situation in DRC*, PTC I, 17 January 2006.

¹⁵² *Situation in Darfur, Sudan*, PTC I, 6 December 2007.

¹⁵³ *Kony et al.*, PTC II, 10 August 2007.

¹⁵⁴ *Lubanga*, Appeals Chamber, 11 July 2008.

¹⁵⁵ *Situation in Darfur, Sudan*, PTC I, 6 December 2007; *Bemba*, PTC III, 12 December 2008.

criterion to be satisfied, the facts generating the harm must ensue from the crime(s) under consideration.¹⁵⁶

Another vital point to be made in the present context is that in order to be comprised by the ambit of the second requirement of rule 85 the harm must have been suffered personally by the individual.¹⁵⁷ Worth noting is that personal harm may relate both to direct and indirect victims, that is, to individuals who suffered direct or indirect harm. This view has been advanced by the ICC and can reasonably be explained by the fact that one and the same event, such as the recruitment of a child soldier, can be the source of harm in the form of personal suffering both as regards the child concerned (the direct victim) and the parents (the indirect victims).¹⁵⁸

2.1.1. Pecuniary Damages

Pecuniary or material damages signify harm to tangible objects. As such, material damages have monetary aspects and are subject to adequate financial redress. In the context of the types and scope of pecuniary damages, the ICC Chambers have made explicit reference to the jurisprudence of regional human rights bodies, in particular, the Inter-American and the European Court of Human Rights. The legal texts of the first, akin to the ICC's constitutive framework, neither provide a definition of harm, nor elucidate the substance of the different types of damages. However, in its case-law the IACtHR has identified pecuniary damages as implying loss or detriment to the income, the expenses incurred related to the events under consideration and the pecuniary consequences that may have a cause-effect link with these events.¹⁵⁹ The Inter-American Court has been consistent in the view that both the loss actually suffered and the subsequent losses due to

¹⁵⁶ According to Judge G. M. Pikis '[t]here must be a direct nexus between the crime and the harm suffered, in the sense of cause and effect,' that is 'the crime itself must be the cause generating the harm' - see the Dissenting opinion of 11 July 2008 of Judge Georgios M. Pikis to the Judgment of the Appeals Chamber of 11 July 2008 (dissenting opinion of Judge Pikis to the Appeals Chamber Judgment of 11 July 2008).

¹⁵⁷ *Lubanga*, Appeals Chamber, 11 July 2008, para. 32; *Bemba*, PTC III, 12 December 2008, para. 72 *et seq.*

¹⁵⁸ *Lubanga*, TC I, Redacted version of 'Decision on 'indirect victims'', ICC-01/04-01/06-1813, 8 April 2009, para. 49.

¹⁵⁹ *Loayza-Tamayo v. Peru*, Judgment of 27 November 1998, Reparations and Costs, Series C No. 42; *Acevedo Jaramillo et al. v. Peru*, Judgment of 7 February 2006, Preliminary Objections, Merits, Reparations and Costs, Series C No. 144; *Acosta-Calderón v. Ecuador*, Judgment of 24 June 2005 on Merits, Reparations and Costs, Series C No. 129; *Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*, Judgment of 5 July 2006, Preliminary Objection, Merits, Reparations and Costs, Series C No. 150; *Miguel Castro-Castro Prison v. Peru*, Judgment of 25 November 2006 on Merits, Reparations and Costs, Series C No. 160.

the sustained material harm (future losses) fall within the range of the eligible pecuniary damages.¹⁶⁰

Similar is the stand of the ECtHR. In its recent jurisprudence the European Court has been facilitated in construing some aspects related to harm by the Practice Direction on Just Satisfaction Claims.¹⁶¹ According to the latter, pecuniary damages cover both the loss actually suffered (*damnum emergens*) and the loss, or diminished gain, to be expected in the future (*lucrum cessans*).¹⁶² This understanding has been sustained by the ECtHR throughout its jurisprudence.¹⁶³

Although the prevailing view among international(ized) adjudicative bodies construes pecuniary harm as including the material damages which have actually come into being and the loss expected in the future, a different perception is to be discerned as well. Pursuant to the ECCC's legal framework the scope of the relevant harm is limited to the actual damages suffered.¹⁶⁴

A) Pecuniary Damages in Regard to Deceased

Pecuniary damages in the name of deceased persons have been recognized by a number of human rights bodies, such as the Inter-American and the European Court of Human Rights, as well as the UN Compensation Commission.

Throughout its jurisprudence, the IACtHR has acknowledged pecuniary damages in favour of deceased persons not only up to the time of their death, but also as a subsequent loss. On several occasions the Court has adjudged, for instance, compensation in the name of deceased victims for the income they could have earned in the future.¹⁶⁵

¹⁶⁰ In the case of *El Amparo v. Venezuela*, Judgment of 14 September 1996 on Reparations and Costs. Series C No. 28, the Court adjudged indemnity to the victims for the period during which they were unemployed as a consequence of the events under consideration.

¹⁶¹ Issued on 28 March 2007 by the President of the ECtHR in accordance with Rule 32 of the Rules of Court.

¹⁶² *Ibid.*, para. 10.

¹⁶³ See e.g. the case of *Ayder and Others v. Turkey*, Application No. 23656/94, Judgment of 8 January 2004, in particular, with respect to the claims for loss of income.

¹⁶⁴ According to rule 23bis(1)(b) of the ECCC's Internal Rules (Rev. 5 - as revised on 9 February 2010), civil party-applicants must demonstrate that they have in fact suffered physical, material or psychological injury as a direct consequence of at least one of the alleged crimes.

¹⁶⁵ See *Miguel Castro-Castro Prison v. Peru*, Judgment of 25 November 2006 on Merits, Reparations and Costs, 2006, Series C No. 160; *Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*, Judgment of 5 July 2006, Preliminary Objection, Merits, Reparations and Costs, Series C No. 150; *El Amparo vs. Venezuela*, Judgment of 14 September 1996 on Reparations and Costs. Series C No. 28, with regard to the work the deceased individuals could have carried out in the future, respectively, the income they could have gained. The

The ECtHR has voiced a different view as regards the entitlement of deceased individuals to pecuniary damages.¹⁶⁶ The Court rejected a claim on behalf of a deceased on the basis that the pecuniary losses were allegedly accruing subsequent to the death of that person. The conclusion *a contrario* is that had the asserted pecuniary damages been incurred by the late individuals before their death, they would have been entitled to compensation in their personal capacity as victims of the violations under consideration. Therefore, one may reasonably infer that according to the European Court deceased persons are entitled to pecuniary damages which have come into being up to the time of death, but not to losses resulting after the death of the individual.

The question of pecuniary harm sustained by deceased victims has been touched upon by the UN Compensation Commission as well. The Commission recognized the right of deceased detainees to compensation for the pecuniary damages suffered in their own personal capacity as a consequence of Iraq's invasion of Kuwait.¹⁶⁷

2.1.2. Non-Pecuniary Damages

Non-pecuniary damages have intangible, immaterial aspects. This type of harm is subject to equitable redress, as no unified or standard scale of monetary indemnification is applicable. Nevertheless, as the USA-Germany Mixed Claims Commission accurately observed, moral damages 'are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them nonetheless real'.¹⁶⁸

Immaterial harm has been interpreted by the ICC as encompassing physical, emotional, mental and psychological damages.¹⁶⁹ In a similar way, the IACtHR has construed moral suffering and has identified moral anguish, terror, insecurity among its manifestations.¹⁷⁰ Throughout its jurisprudence the Inter-American Court acknowledged

Court assessed the indemnification on the basis of the years remaining before the deceased victims would have reached the age at which normal life expectancy is estimated.

¹⁶⁶ *Kiliç v. Turkey*, Application 22492/93, Judgment of 28 March 2000.

¹⁶⁷ Report and Recommendations of the 'D1' Panel of Commissioners Concerning the Special Instalment of Deceased Detainee Claims of 10 March 2005. Various types of pecuniary damages were identified as suffered by the deceased: departure expenses, business and real property losses. An award of compensation in favour of the deceased detainees was recommended.

¹⁶⁸ *Opinion in the Lusitania Cases*, 1 November 1923, Reports of International Arbitral Awards, vol. VII, United Nations, 2006, p. 40.

¹⁶⁹ *Situation in DRC*, PTC I, 17 January 2006; *Kony et al.*, Appeals Chamber, 23 February 2009.

¹⁷⁰ *'Mapiripán Massacre' v. Colombia*, Judgment of 15 September 2005, Merits, Reparations and Costs, Series C No. 134.

moral harm as including the suffering and hardship caused to the victims (both direct and indirect), the harm to objects of value to the individual, as well as changes of a non-pecuniary nature in the living conditions.¹⁷¹ An intriguing aspect of immaterial harm exceeding the ambit of moral damages - spiritual damage ('daño espiritual')¹⁷² – has also been suggested.

The issue of non-pecuniary damages has been addressed by the ECtHR both in its case-law and in the Practice Direction on Just Satisfaction Claims. Although the latter does not provide an exhaustive definition of moral harm, it enumerates several forms which this type of harm can take, such as mental or physical suffering.¹⁷³ Throughout its jurisprudence the ECtHR has identified as representations of immaterial harm anxiety, inconvenience, frustration, distress, anguish and uncertainty caused by a violation.¹⁷⁴

According to the ICTR, serious bodily and/or mental harm includes, *inter alia*, acts of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence and persecution.¹⁷⁵ The ICTR construed mental harm 'as some type of impairment of mental faculties, or harm that causes serious injury to the mental state'.¹⁷⁶ Likewise, the ICTY has interpreted inhuman treatment, torture, rape, sexual abuse, deportation, wounds and trauma suffered by survivors of mass executions as being among the facts which may cause serious moral harm, such as bodily and mental injury.¹⁷⁷ Similarly, physical and psychological harm as forms of non-pecuniary damages have also been identified by the

¹⁷¹ *Plan de Sánchez Massacre v. Guatemala*, Judgment on Reparations of 19 November 2004, Series C No. 116; *Acosta-Calderón v. Ecuador*, Judgment of 24 June 2005 on Merits, Reparations and Costs, Series C No. 129; '*Mapiripán Massacre*' v. *Colombia*, Judgment of 15 September 2005, Merits, Reparations and Costs, Series C No. 134.

¹⁷² See the separate opinion of Judge Cançado Trindade to the Judgment in the case of *Moiwana Community v. Suriname*, Judgment on the Merits and Reparations of 15 June 2005, Series C No. 124, according to whom spiritual damage is an aggravated form of moral damage with a direct bearing on most intimate values to the human person, such as inner self, beliefs in human destiny, relations with the dead.

¹⁷³ See para. 13 of the Practice Direction.

¹⁷⁴ *Comingersoll S.A. v. Portugal*; *McKerr v. the United Kingdom*, Application no. 28883/95, Judgment of 4 May 2001 (final as of 4 August 2001); *Ki mir v. Turkey*, Application 27306/95, Judgment of 31 May 2005 (final as of 31 August 2005).

¹⁷⁵ ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Chamber I, Judgment, Case ICTR-96-4-T, 2 September 1998, para. 504; ICTR, *The Prosecutor v. Alfred Musema*, TC I, Judgment and Sentence, Case ICTR-96-13-T, 27 January 2000, para. 156.

¹⁷⁶ ICTR, *The Prosecutor v. Sylvestre Gacumbitsi*, TC III, Judgment, Case ICTR-2001-64-T, 17 June 2004, para. 291.

¹⁷⁷ ICTY, *The Prosecutor v. Radislav Krstic*, Trial Chamber, Judgment, Case IT-98-33-T, 2 August 2001, paras. 513-514.

UN Compensation Commission. Both mental pain and anguish have been acknowledged by the Commission as manifestations of psychological harm.¹⁷⁸

An intriguing interrelation between the different manifestations of immaterial harm has been advanced by the USA-Germany Mixed Claims Commission in the context of the *Lusitania* cases.¹⁷⁹ The Commission found that mental pain may result in physical suffering due to the interdependency of the mind and the body. Accordingly, mental shock ('sickness of mind') may produce physical disorders ('sickness of body'). Explained in other words, the mental suffering represents the primary (initial) harm which may lead to the infliction of secondary harm - physical disorder. The Commission distinguished different types of psychological trauma: injury to feelings, humiliation, shame, degradation, loss of social position or injury to one's credit or reputation. In this regard it is worth mentioning that injury to honour has also been recognized as a type of harm in the relevant provisions of the Treaty of Versailles.¹⁸⁰ Likewise, more recently, the interrelation between psychological and physical injury has been endorsed in the jurisprudence of the ECCC, where it has been observed that the infliction of psychological harm may result in a physical disorder.¹⁸¹

A) Non-Pecuniary Damages in Regard to Deceased

The entitlement of deceased persons to immaterial damages has been widely recognized at the international level, in particular in the case-law of human rights bodies. In the assessment of the non-pecuniary damages suffered by the deceased the Inter-American Court has taken into account the manner in which the victims died within the context of the violent events, whether they were subjected to abuse, torture and other degrading treatment,¹⁸² and has awarded compensation in the name of the deceased.

¹⁷⁸ See Governing Council's Decisions 3 (S/AC.26/1991/3) of 23 October 1991 and 218 (S/AC.26/Dec.218 (2004)) of 11 March 2004.

¹⁷⁹ See the opinion of the Commission, delivered by the Umpire Parker on 1 November 1923 in *Opinion in the Lusitania Cases*, 1 November 1923, Reports of International Arbitral Awards., vol. VII, United Nations, 2006, p. 36.

¹⁸⁰ Article 244, Annex I (3) of the Treaty of Versailles.

¹⁸¹ ECCC, Case 001, Supreme Court Chamber, Appeal Judgment of 3 February 2012, para. 417.

¹⁸² *Miguel Castro-Castro Prison v. Peru*, Judgment of 25 November 2006 on Merits, Reparations and Costs, 2006, Series C No. 160; *Aloeboetoe et al. v. Suriname*, Judgment of 10 September 1993 on Reparations and Costs, Series C No. 15; *Garrido and Baigorria v. Argentina*, Judgment of 27 August 1998 on Reparations and Costs, Series C No. 39; *Ituango Massacres v. Colombia*, Judgment of 1 July 2006, Preliminary Objections, Merits, Reparations and Costs, , Series C No. 148; *Bámaca-Velásquez v. Guatemala*, Judgment of 22 February

In a similar way, both the ECtHR and the Human Rights Chamber of the Commission on Human Rights for Bosnia and Herzegovina have acknowledged the right of deceased victims to compensation for the immaterial harm suffered up to the time of their death. The UN Human Rights Committee has ruled in the same vein.

An intriguing matter which arises within this context is related to the adjudication and collection of the sum awarded as compensation in the name of the deceased individual. Each of the human rights bodies – the IACtHR,¹⁸³ the ECtHR,¹⁸⁴ the Human Rights Chamber of the Commission on Human Rights for Bosnia and Herzegovina¹⁸⁵ and the UN Human Rights Committee¹⁸⁶ – granted compensation to the deceased persons in their own right and adjudged that the awarded sum be held for their heirs as successors.

Although this understanding has been followed by the majority of the judges, some have disagreed with this approach. The caveats raised in the dissents are predominantly practical and, as such, irrelevant with regard to the correctness of the majority's view. Both the dissenting opinions to the findings of the ECtHR and the Human Rights Chamber go beyond the legal issue of entitlement to compensation, as they question the ways in which the award for damages is to be collected. Hence, the dissenting views confound two different notions which have distinct ambit and implications – the award of the compensation in the name of the deceased persons and the collection of the awarded sum.¹⁸⁷

2002, Reparations and Costs, Series C No. 91; '*Mapiripán Massacre*' v. *Colombia*, Judgment of 15 September 2005, Merits, Reparations and Costs, Series C No. 134; *Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*, Judgment of 5 July 2006, Preliminary Objection, Merits, Reparations and Costs, Series C No. 150.

¹⁸³ In the case of *Aloeboetoe et al. v. Suriname*, Judgment of 10 September 1993 on Reparations and Costs, Series C No. 15 the Court held that '[t]he damages suffered by the victims up to the time of their death entitle them to compensation. That right to compensation is transmitted to their heirs by succession'. See in the same vein '*Street Children*' (*Villagrán-Morales et al.*) v. *Guatemala*, Judgment of 26 May 2001 on Reparations and Costs, Series C No. 77.

¹⁸⁴ *Kurt v. Turkey*, Application 24276/94 [1998] ECHR 44, Judgment of 25 May 1998; *Mahmut Kaya v. Turkey*, Application 22535/93, Judgment of 28 March 2000; *Kiliç v. Turkey*, Application 22492/93, Judgment of 28 March 2000; *Ki mir v. Turkey*, Application 27306/95, Judgment of 31 May 2005 (final as of 31 August 2005).

¹⁸⁵ *Avdo and Esma Palic against the Republika Srpska*, Decision on admissibility and merits, 11 January 2001, Case CH/99/3196, paras. 69-70, 90.

¹⁸⁶ In the case of *Eduardo Bleier v. Uruguay* the Committee urged the Uruguayan government to pay compensation to the victim for the injuries which he had suffered as a result of the violations found.

¹⁸⁷ See the partly dissenting opinions of Judge Gölcüklü to the Judgments in the case of *Mahmut Kaya v. Turkey* and the case of *Kiliç v. Turkey* of the ECtHR, who opined that: '[i]t is completely alien and contrary to the Convention system and devoid of any legal justification for an abstract, anonymous and undefined group (perhaps very distant heirs) that has suffered no non-pecuniary damage as a result of the violations found to be awarded compensation.' See the dissenting opinion of Mr. Vitimir Popovic to the Decision on admissibility in the case of *Avdo and Esma Palic against the Republika Srpska* of the Human Rights Chamber of the Commission on Human Rights for Bosnia and Herzegovina, who argued that: 'it is not clear [...] what the

The approach adopted by the majorities of the two regional institutions unambiguously entitles the deceased individuals in their own right to compensation for the non-pecuniary harm which they have sustained. By doing so, the human rights bodies recognize the suffering inflicted upon the deceased as a result of the violation(s) and proclaim their right to indemnification. Thus, the issue concerning the award of the damage suffered by the deceased person is straightforward and justified.

Another matter, separate from the question of the award, relates to the collection of the adjudged sum. The majorities have properly ruled that the compensation be held by and for the heirs of the late individual. The logic of this finding rests on the fact that the compensation by virtue of inheritance passes into the patrimony of the heirs. The concern raised in the dissents of whether or not the heirs themselves had suffered non-pecuniary damages as a result of the violations found is also irrelevant to the particular subject-matter and, respectively, to the issue of compensation. The right of the heirs to receive the sum adjudged in the decedent's name ensues from the precepts governing succession and descent. The successors' entitlement to receive the adjudged compensation does not originate from the facts of the case under consideration, but arises by virtue of another, juridical fact - the death of their predecessor.

2.2. Harm Sustained by Legal Persons

As previously noted, the damages sustained by the second group of victims pursuant to rule 85(b) have a significantly narrower ambit than the harm suffered by natural persons. Only harm caused to property of organizations and/or institutions is eligible. In addition, the law does not favour harm to any property, but limits it to property related to religion, education, art, science or charitable purposes, and to their historic monuments, hospitals, other places and objects of humanitarian purposes. Notwithstanding these limitations, the last part of rule 85(b) leaves certain latitude to the Court in the assessment of the exact damages in light of the particularities of each case. This inference stems from the wording 'other places and objects of humanitarian purposes'.¹⁸⁸ The discussed part of the provision

compensation for non-pecuniary damage [...] relates to, *i.e.* whether these damages are awarded to the applicant, to her husband, or to his heirs'.

¹⁸⁸ See article 8 which enumerates certain objects as forbidden targets of military operations.

is left open-ended by the drafters and, as such, allows yet discretion to the Court in its interpretation of the harm within the parameters delineated in the legal text.

An intriguing question in the present context is whether legal entities are entitled to non-pecuniary damages, such as emotional harm, mental anguish or any other form of ‘intangible injuries’.¹⁸⁹ The jurisprudence of the ICC has not addressed this issue. However, this question has been considered by the ECtHR.

Albeit the characteristics ‘emotional’, ‘moral’ and ‘mental’ are not inherent attributes to non-human entities, nevertheless the European Court has held that compensation for moral damages claimed by legal persons is not generally excluded and decided that such an entitlement should be evaluated on a case-by-case basis.¹⁹⁰ Thus, even though the ECtHR did not take a firm position on this matter, it did not exclude such a possibility. As illustrations of immaterial harm sustained by a legal entity, the Court identified its reputation, uncertainty in decision-planning, disruption in the management, as well as the anxiety and inconvenience caused to the members of the management team.

Although the ECtHR drew its findings on the judicial practice of domestic legal systems and observed, accordingly, that the latter does not rule out an award of compensation for non-pecuniary damages to legal persons, such an interpretation remains far from unproblematic, especially within the context of the ICC’s legal framework. Bearing in mind the specific nature of the crimes within the Court’s jurisdiction, as well as the cautious and restrictive legislative approach towards the introduction of the second group of victims, a potential recognition of intangible damages sustained by juridical persons seems neither rational, nor warranted.

IV. The Third Criterion: Jurisdiction

The third eligibility criterion for victims before the ICC provides that the crime from which the harm ensued must fall within the jurisdiction of the Court. For the purposes of the present analysis only a brief reference will be made to the basic features of this requirement.

In order to fall within the jurisdiction of the Court, the alleged events which inflicted the harm must be crimes referred to in articles 5(1)(a) – 5(1)(c) and defined in

¹⁸⁹ Shelton, *supra* note 100, p. 143.

¹⁹⁰ *Comingersoll S.A. v. Portugal*, Application 35382/97, Judgment of 6 April 2000.

articles 6 - 8 (jurisdiction *ratione materiae*). The crime must have been committed within the timeframe laid down in article 11, that is, since 1 July 2002 (jurisdiction *ratione temporis*). Further, the alleged events must meet one of the two alternative conditions embodied in article 12: 1) the crime must be committed on the territory of a State Party to the Statute or a State which has made a declaration provided for in article 12(3) (jurisdiction *ratione loci*) or 2) the crime must be committed by a national of a State Party or a State which has made a declaration provided for in article 12(3) (jurisdiction *ratione personae*).¹⁹¹

V. The Fourth Criterion: Causal Link

The causal link between the harm suffered and the crime is the last requirement which must be met by victim-applicants. This eligibility criterion distinguishes itself as the most debatable among the prerequisites set forth in rule 85. The fourth requirement originates concerns as to whether any person who has suffered from a crime under the jurisdiction of the ICC can be accorded victim status irrespective of any nexus with the subject-matter of the pending proceedings or only persons who have sustained harm as a result of crimes which are the subject-matter of a given situation or case. The accurate interpretation of the last eligibility criterion has an important implication upon the potential number of victim-applicants and participants¹⁹² and is essential for the efficient functioning of the ICC.

The initial jurisprudence of the Court proves inconsistent with regard to the interpretation of the causal link criterion in view of the juxtaposition of the findings of the Pre-Trial Chambers and the Appeals Chamber, on the one hand, with those of TC I, on the other. The majority of the Chambers have adopted the understanding that only persons who can establish a causal link between the harm suffered and the crime(s) under

¹⁹¹ See article 12(2) and (3) of the Rome Statute read in conjunction with rule 44. See also *e.g. Situation in DRC*, PTC I, 17 January 2006, para. 85; *Kony et al.*, PTC II, 10 August 2007, para. 29; *Lubanga*, Appeals Chamber, Judgment on the Appeal of Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, 14 December 2006, paras. 21-22; *Bemba*, PTC III, 12 December 2008, para. 67; *Situation in the Republic of Kenya*, PTC II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation, ICC-01/09-19-Corr, 31 March 2010, paras. 36-39.

¹⁹² McDermott, *supra* note 33, p. 32; War Crimes Research Office, 'Victim Participation at the Case Stage of Proceedings. International Criminal Court Legal Analysis and Education Project', *American University Washington College of Law* (February 2009), p. 41; REDRESS, *Victims and the ICC: Still Room for Improvement* - a paper prepared for the 7th Assembly of States Parties, The Hague, 14-22 November 2008.

consideration may qualify as victims pursuant to rule 85.¹⁹³ The logic of this view is in tune with universal principles of criminal justice, and accordingly, with the precepts governing victims' participation.

The relevant harm which entitles persons to claim victim status before a criminal justice institution is the harm which results from the crime – the subject-matter of the pending proceedings. If the alleged damages do not originate from an event pertaining to the core of the particular criminal procedure, no causal nexus exists between the harm and the crime(s) under consideration. Hence, applicants who claim to have suffered harm which is not related to the subject-matter and has no bearing on the proceedings at hand are extraneous to the specific criminal justice process. The pertinent inference is that such persons have no legal standing before the Court in the situation or case in question and are not entitled to be accorded victim status pursuant to rule 85.¹⁹⁴

The opposite understanding would infringe overarching criminal justice postulates. Judicial institutions are bound to pronounce solely on the events and facts constituting the core of the proceedings. If the Court would consider issues falling outside the parameters of the respective situation or case it would exceed its authority. As a consequence, the final determination of the judicial body would have no legal effect (*i.e.* would be *ultra vires*). Moreover, an interpretation rejecting the need of a causal nexus between the harm and the crime(s) under consideration would also prove impractical. The consequence of such a view would be the flooding of the proceedings with a myriad of persons who have suffered from incidents wholly unrelated to the crimes that constitute the subject-matter of the situation or case before the ICC. This would inadmissibly alter the legal nature of the Court from a criminal justice institution, bound to adjudge exclusively on the facts which are the subject of the pending proceedings, into a quasi- or non-judicial body. It holds equally true that '[d]erogating from [the] requirement [for causal link between the harm suffered by the victim and the crimes with which the accused has been charged] would seriously jeopardize the right of the accused to be tried only in relation to the crimes charged.'¹⁹⁵

¹⁹³ *Situation in DRC*, PTC I, 17 January 2006; *Lubanga*, PTC I, Decision on Victims' Applications for Participation in the Proceedings, ICC-01/04-01/06-228-tEN, 28 July 2006; *Situation in Uganda*, PTC II, Decision of 10 August 2007; *Bemba*, PTC III, 12 December 2008.

¹⁹⁴ See in this spirit *Lubanga*, Appeals Chamber, 11 July 2008, para. 63, where the Chamber underlined the need for each applicant to demonstrate a link between the harm suffered and the particular crimes charged.

¹⁹⁵ Spiga, *supra* note 24, p. 4.

The findings of the majority of TC I merit a brief reference as they illustrate the opinion that no causal nexus between the alleged harm(s) and the crime(s) under consideration is required pursuant to rule 85.¹⁹⁶ While holding that ‘a victim of any crime falling within the jurisdiction of the Court can potentially participate’, the Chamber at the same time noted that ‘it would not be meaningful or in the interests of justice for all such victims to be permitted to participate’ because the evidence and issues for examination will be ‘wholly unrelated’ to the crimes that caused harm to such victims. Instead of construing the last eligibility criterion creatively in light of its object and purpose, the majority of TC I made dubious findings, to say the least.¹⁹⁷ Not surprisingly, this interpretation of the causal link criterion was subsequently overruled by the Appeals Chamber which recognized the crucial importance of a nexus between the harm suffered and the particular crimes charged.¹⁹⁸

The rationale behind the prevailing standpoint of the ICC’s Chambers with regard to the causal link criterion informs the approach adopted at the STL and the ECCC likewise. The requirement for a direct nexus between the alleged offence and the harm suffered by the victim is explicitly stipulated in the definition of a victim pursuant to rule 2(A) of STL’s Rules of Procedure and Evidence.¹⁹⁹ In the same vein, the ECCC’s Internal Rules contain an express requirement for a direct link between the alleged harm and the crime(s) under consideration. Notwithstanding some contentions in the opposite vein,²⁰⁰ the careful perusal of rule 23 of ECCC’s Internal Rules both in its initial²⁰¹ and amended versions²⁰² attests to the fact that the requirement for a causal link between the crime and

¹⁹⁶ *Lubanga*, TC I, 18 January 2008.

¹⁹⁷ See in the same vein Christine H. Chung, ‘Victims’ Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?’, *Northwestern Journal of International Human Rights*, vol. 6, 3 (Spring 2008), pp. 459 – 545, p. 516.

¹⁹⁸ See also the dissenting opinion of Judge René Blattmann to the Decision in *Lubanga*, TC I, 18 January 2008.

¹⁹⁹ The provision reads as follows: ‘Victim: A natural person who has suffered physical, material, or mental harm as a direct result of an attack within the Tribunal’s jurisdiction’.

²⁰⁰ Silke Studzinsky, ‘Victim’s Participation before the Extraordinary Chambers in the Courts of Cambodia’, *Zeitschrift für Internationale Strafrechtsdogmatik* (www.zis-online.com) 2011 (10), pp. 887-891, p. 890.

²⁰¹ Rule 23(2), second sentence of the Internal Rules (in its redaction of 2007) reads as follows: ‘In order for Civil Party action to be admissible, the injury must be:

a) physical, material or psychological; and
b) the direct consequence of the offence, personal and have actually come into being.’

²⁰² Rule 23bis (adopted on 9 February 2010, Rev. 8) reads as follows: ‘1. In order for Civil Party action to be admissible, the Civil Party applicant shall:

a) be clearly identified; and
b) demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based.’

the harm suffered as introduced at the outset, has remained unchanged.²⁰³ An eloquent reflection of the causal nexus requirement provides also the ECCC's jurisprudence through the stipulation that injury resulting from the crimes charged is the only defining and at the same time limiting criterion for the admissibility of civil party applications in proceedings.²⁰⁴

In the same spirit, the Practice Direction on Just Satisfaction Claims of the ECtHR sets forth the requirement for a clear causal link between the damage and the alleged violation, and elucidates that a merely tenuous connection would not suffice.²⁰⁵ Likewise, the constitutive documents of the UN Compensation Commission also provide for the need of a direct nexus between the harms inflicted and the violation(s) found.²⁰⁶ An analogous view was entertained by the USA-Germany Mixed Claims Commission. Pursuant to Administrative Decision II the cause of the suffering inflicted upon the applicants – the loss, damage or injury suffered – must have been the act of Germany or its agents.²⁰⁷

The present analysis shows that the eligibility as a victim before the ICC entails multifarious and complex issues the accurate analysis of which proves critical for the proper operation of the victims' participation scheme. While some complicated matters ensuing from the interpretation of rule 85 have already been resolved by the Court, others need further consideration and clarification. While within the ambit of the first eligibility criterion the approach followed by the ICC in construing the identification requirements is nowadays unified, with respect to the complex issue of deceased the discrepancy among the Chambers continues and is likely to persist. Other questions originating from the eligibility criteria have not been addressed hitherto by the Court in detail. Therefore, it may reasonably be expected that matters such as the nature and the scope of the harm

²⁰³ This observation finds further support in the relevant findings of the Supreme Court Chamber and the acknowledgement that the admissibility criteria in the definition of a civil party as envisaged in the original version of rule 23(2) have been clarified, but have not been changed by the subsequent amendments to the rule. See ECCC, Case 001, Appeal Judgment of 3 February 2012, para. 412 and footnote 866.

²⁰⁴ *Ibid.*, para. 415.

²⁰⁵ See paras. 7 and 8 of the Practice Direction.

²⁰⁶ See para. 18 in conjunction with para. 16 of UNSC Resolution 687 (1991), as well as Governing Council's Decision 15. See also Danilo Campanelli, 'The United Nations Compensation Commission (UNCC): Reflections on its Judicial Character', *The Law and Practice of International Courts and Tribunals*, vol. 4, 1 (2005), pp. 107-139.

²⁰⁷ *Mixed Claims Commission (United States and Germany) (1 November 1923 – 30 October 1939)*, Reports of International Arbitral Awards, vol. VII, United Nations, 2006, p. 22.

sustained by the second group of victims and the relevant types of damages will require thorough analysis and thought in future.

In addition to the objective to decipher and unfold major concerns arising from rule 85, the suggested juxtaposition of the ideas underlying the victims' eligibility requirements with the legal regime and practice of other international(ized) and regional adjudicative institutions gives a broader view of the prevailing ideas, standards and trends in the realm of victim-related issues on a larger international scale. However, it is of pivotal importance that the experience of other international(ized) adjudicative bodies should be used only as potential guidance and should not be adopted by the ICC automatically, without demur.

VI. The Victim Definition and the Presumption of Innocence

Besides the manifold issues related to the interpretation of rule 85 and the requirements which it delineates, the victim definition has been perceived as problematic with respect to the presumption of innocence.²⁰⁸ While some commentators aver that the concept of victim as formulated by the Rules appears to presuppose that a crime has been committed,²⁰⁹ others directly challenge the victim definition as eroding the presumption of innocence.²¹⁰ In view of the contentions raised, the positive determination of victim status has been equated to a premature judicial conclusion that the alleged crime has occurred. In this regard it has been contended that the acknowledgment of victim status establishes two key elements that the Prosecutor must prove beyond reasonable doubt, namely, that a crime occurred and that there are victims.²¹¹ Following this line of reasoning it has been

²⁰⁸ Jorda and de Hemptinne, *supra* note 1, p. 1403. See in the same vein, Scott T. Johnson, 'Neither Victims nor Executioners: the Dilemma of Victim Participation and the Defendant's Right to a Fair Trial at the International Criminal Court', *ILSA Journal of International and Comparative Law*, vol. 16:2 (2009-2010), pp. 489-496, where the author contends that victims' participation in proceedings erodes the presumption of innocence.

²⁰⁹ *Ibid.*, Jorda and de Hemptinne.

²¹⁰ Johnson, *supra* note 208.

²¹¹ In this regard it has been observed that '[o]ne is [...] left to conclude that by finding that applicants are victims of the alleged crime for which the defendant is prosecuted, judges also necessarily find that the alleged crime has occurred' – see Mugambi Jouet, 'Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court', *Saint Louis University Public Law Review*, vol. 26 (2007), pp. 249-308, p. 271.

suggested that a successful victim's application or, in other words, the recognition of victim status is the functional equivalent of a preliminary verdict.²¹²

The contentions advanced above prove untenable in light of the following considerations. The understanding that the victim definition pursuant to rule 85 infringes the presumption of innocence falls short of discerning the substance and purpose of the recognition of a person as a victim, on the one hand, and the essence of the presumption of innocence, on the other. Indubitably, the presumption of innocence is an overarching criminal justice tenet dictating that the proceedings should be conducted with respect to the defendant as if innocent.²¹³ Hence, the alleged perpetrator has the legal status of innocence prior to conviction.²¹⁴ As such, the presumption of innocence represents a direction to officials about how they should proceed in respect to the alleged perpetrator, not a prediction of the outcome of the proceedings at hand.²¹⁵ Consequently, the presumption of innocence safeguards the integrity of the criminal justice process through the duty on public authorities to refrain from 'prejudging of the outcome of a trial'.²¹⁶ In view of that, the logical conclusion to be advanced is that by virtue of the presumption of innocence, until there has been an adjudication of guilt by a legally competent authority, the issue concerning the guilt of the alleged perpetrator remains an open question.²¹⁷

Along the same lines it is to be noted that the recognition of victim status pursuant to rule 85 solely entails that the events as described in the victim's application fall within the compass of the charges brought against the alleged offender(s). In other words, as long as the events described in the application for participation correspond with the scope of the charges delimiting the subject-matter of the proceedings at hand (temporal, territorial and material), this warrants the admission of victims in proceedings. The victim definition serves the sole purpose of differentiating between persons who are entitled to a legal standing in proceedings (thus, may be admitted as victim-participants in the criminal

²¹² See, *inter alia*, *ibid.*, as well as Jorda and de Hemptinne, *supra* note 1.

²¹³ Andrew Ashworth, 'Four Threats to the Presumption of Innocence', *International Journal of Evidence and Proof*, vol. 10:4 (2006), pp. 241-279, p. 250.

²¹⁴ *Ibid.*, p. 244.

²¹⁵ See Herbert L. Packer, 'Two Models of the Criminal Process', *University of Pennsylvania Law Review*, vol. 113:1 (1964-1965), pp. 1-68, p. 12.

²¹⁶ Thomas Margueritte, 'International Criminal Law and Human Rights', *Routledge Handbook of International Criminal Law*, William A. Schabas and Nadia Bernaz (eds.), Routledge, 2010, pp. 435-452, p. 441.

²¹⁷ See Packer, *supra* note 215, who aptly notes that 'until there has been an adjudication of guilt by an authority legally competent to make such an adjudication, the suspect is to be treated, for reasons that have nothing whatever to do with the probable outcome of the case, as if his guilt is an open question. The presumption of innocence is a direction to officials how they are to proceed, not a prediction of outcome.'

justice process) from persons who are not. Notwithstanding arguments in the opposite vein advanced by commentators,²¹⁸ the recognition of victim status neither predetermines that the crimes as described have actually been committed, nor that the alleged events are attributable to the individual criminal responsibility of the alleged offender(s). In the course of the ICC's fact-finding process it could, for instance, be established that the alleged harmful events have either not taken place as described in the charges or do not represent a crime pursuant to article 5 for different reasons (due to the lack of objective and/or subjective elements of the crime as enunciated in the relevant statutory provision or due to the existence of grounds excluding the criminal responsibility of the alleged perpetrator(s)). Similarly, on the basis of the evidence gathered in the course of the proceedings it could be established that, even though the alleged events represent a crime within the ICC's jurisdiction, they are not attributable to the individual(s) standing trial. Accordingly, the recognition of a person as a victim pursuant to rule 85 does not in itself entail a (pre-)determination of any element comprised by the subject-matter under consideration. Moreover, unlike the ICTY's and ICTR's victim definition, the rule 85 definition focuses on the harm suffered, as alleged by the victim, rather than on the purported crime itself or the identity of the perpetrator. In this regard, pursuant to the relevant ICC's jurisprudence the identification of the alleged perpetrator in the application for participation is not among the prerequisites for a complete application. As also acknowledged in the legal literature, victims are not victims of the accused, but victims of 'a crime' which the defendant may or may not have committed - a fact that is to be determined at trial.²¹⁹ Furthermore, by way of reference to the UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Humanitarian Law commentators duly note that a victim is a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted.²²⁰ Given all the above, the logical conclusion to be advanced is that the victim

²¹⁸ See e.g. Zappalà, *supra* note 11, p. 146-147, who contends that the recognition as victim entails 'a preliminary finding that a crime was committed against [the victim]', which, on its part presupposes 'a presumption as to the unfolding of events.' The author further avers that '[t]his implies the establishment (at least prima facie) of the fact that a crime occurred and that the persons claiming the status of victims were somehow affected by this crime' and subsequently observes that the Court should 'not take the factual basis of the crimes for granted.'

²¹⁹ Frédéric Mégret, 'Victims before the International Criminal Court: A New Model of Criminal Justice?', *Victims of Crime Research Digest*, Issue 5 (2013).

²²⁰ Mariana Pena, 'Victim Participation in the International Criminal Court: Achievements Made and Challenges Lying Ahead', *ILSA Journal of International and Comparative Law* 16 (2010), pp. 497-516, p. 511.

definition and, respectively, the recognition of a person as a victim pursuant to rule 85 has no inimical bearing on the presumption of innocence.

CHAPTER TWO

Classification of the Rights of Victims in the Proceedings

The fulfillment of the requirements delineated in rule 85 entails the entitlement to an array of rights in the course of the proceedings. Therefore, once the prerequisites for the eligibility as a victim have been deciphered, the consequent issue to be immediately illuminated concerns the rights that persons qualifying as victims may employ throughout the proceedings. At this point, before embarking on the review of the rights provided to persons with victim status, a few introductory notes on the various avenues of involvement available to victims at the ICC prove apposite.

Notwithstanding their independent place in the proceedings, victims do not have a standing equivalent to the Prosecutor and to the defence. Thus, the possibilities for victims to intervene in the ICC's process accorded by virtue of the normative basis are more limited in scope and nature than the rights bestowed to the Prosecutor and the defence.²²¹

Still, as participants with an independent standing victims are entitled to participate in the proceedings leading to the adjudication of the individual criminal responsibility of the alleged offender(s), in specific proceedings of limited object and purpose, as well as in reparation proceedings following a conviction. These possibilities for victims' intervention in the ICC's proceedings are separate and distinct and may be employed independently from one another.

In principle, the involvement of victims in the proceedings is governed by article 68(3), unless the legal framework provides explicitly for victims' participation in particular proceedings. This observation is also echoed in the relevant jurisprudence.²²² Thus, the regime of victims' participation laid down in article 68(3) represents the

²²¹ Among the rights which, according to the legal framework, pertain exclusively to the Prosecutor and the defence, is the right to appeal the Trial Chamber's decision (judgment) on the merits of the case (*see* article 81(2)), as well as the right to submit evidence. Whether the latter is an implicit right with respect to victims is, however, a question open to discussion. Along the same lines, in the context of proceedings before the ECCC commentators have observed that victims (*i.e.* civil parties) are 'full parties' to the trial, 'since [the legal framework] recognizes their right to appeal decisions of the Trial Chamber [as provided for in article 36 new of the Law on the ECCC]' – *see* David Boyle, 'The Rights of Victims. Participation, Representation, Protection, Reparation', *Journal of International Criminal Justice*, 4 (2006), pp. 307-313, p. 308. Accordingly, the right to appeal the Trial Chamber's adjudication of the individual criminal responsibility of the accused is rightly identified as a feature strictly characteristic of a party to the proceedings.

²²² *Situation in the Republic of Kenya*, PTC II, Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, ICC-01/09-24, 3 November 2010 (*Situation in the Republic of Kenya*, PTC II, Decision of 3 November 2010).

fundamental, general normative basis of the participation of victims in the ICC's process. The substance and the rationale behind article 68(3) will be examined in a separate chapter. In the present context it suffices to note that this norm affords victims, where their personal interests are affected, the right to intervene at stages of the proceedings deemed to be appropriate by the Court. The legal regime set forth in article 68(3) vests the relevant Chamber with the authority to assess whether the victims' personal interests are affected by the proceeding(s) at hand, as well as the appropriateness of their participation at the particular procedural stage in light of the rights of the accused and the precepts of fair and impartial trial. Article 68(3) neither predetermines the stages at which victims may intervene, nor the exact scope or the concrete manner in which their participation may take place.

Besides this general victims' participation scheme designed by the drafters, the Court's statutory documents afford victims the possibility to intervene in proceedings of limited object and purpose. Such, for instance, are the proceedings concerning the Prosecutor's request to the Pre-Trial Chamber for authorization of an investigation pursuant to article 15(3), as well as the proceeding with respect to challenges to the jurisdiction of the Court or the admissibility of a case envisaged in article 19(3). These specific proceedings represent a 'separate form of victim involvement in the early stage of the [ICC's process], outside the general framework of [a]rticle 68(3)'.²²³ Consequently, this *lex specialis* regime provides another concurrent possibility for victims to partake in proceedings taking place before the ICC, albeit to a more limited extent. The input of victims in the context of the proceedings of articles 15 and 19 is confined to making representations and, accordingly, submitting observations. Once victims exercise their right to make representations or to submit observations in these specific proceedings, their intervention for the purposes of the proceedings at hand is exhausted, thus, comes to an end.

Victims are also entitled pursuant to article 75 to the right to claim reparations following a conviction.²²⁴ As previously mentioned in passing, the possibility to claim reparations may be employed irrespective of whether a victim has exercised the right to participate in the proceedings leading to the adjudication of the individual criminal

²²³ Baumgartner, *supra* note 22, p. 415.

²²⁴ This distinct regime has also been duly noted by the Appeals Chamber – see *Situation in the DRC*, Appeals Chamber Decision of 19 December 2008.

responsibility of the alleged offender(s). Thus, regardless of whether victims have taken part in proceedings on the subject-matter of the criminal case, they are afforded the right to apply for reparations after conviction. The same holds true as regards the opposite scenario. Whether a victim intends to apply for reparations following a conviction has no bearing on the right to take part in proceedings on the merits of the criminal case.

The particular purpose and scope of reparation proceedings, as well as the standing of victims therein will be examined in more detail at a later stage. Still, at this point it is to be noted that, by contrast to proceedings on the merits of the criminal case, as well as proceedings concerning the authorization of an investigation and challenges to jurisdiction and admissibility, the participation of victims in reparation proceedings is a *condicio sine qua non* for the very existence of these proceedings. Unlike any other procedure before the Court, the involvement of victims in the context of reparation proceedings is indispensable. This is due to the fact that the harm sustained by victims lies at the core of this type of proceedings. The harm purportedly ensuing from the commission of the crime(s) alleged to have been committed by the person(s) standing trial represents the subject-matter of reparation proceedings.

The few core rights of victims outlined above have so far been in the spotlight. The right to participation pursuant to article 68(3), the right to take part in proceedings pursuant to article 15(3) and 19(3), and the right to claim reparations have been discussed in the legal literature in the context of the overarching precepts of victims' right to access to justice, to know the truth, to be heard and to receive compensation. These rights have been examined against the backdrop of the rights of the accused, fairness and impartiality of proceedings.²²⁵ However, besides the rights just mentioned, the statutory framework entitles victims to a wider range of rights throughout the ICC's proceedings. Accordingly, notwithstanding the correct observation that the ICC's framework contains the most comprehensive and specific list of victims' participatory rights in criminal proceedings,²²⁶ still, the literature to-date does not suggest a comprehensive review or a classification of the rights of victims afforded by the Court's founding documents. Besides the few

²²⁵ See e.g. Zappalà, *supra* note 11, p. 149.

²²⁶ Raquel Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes', *Vanderbilt Journal of Transnational Law*, vol. 35:5 (2002), pp. 1399-1501, p. 1429.

sporadic distinctions between, for instance, absolute and discretionary rights,²²⁷ ‘primary’ and ‘subsidiary’ rights,²²⁸ the panoply of rights which ‘can be found scattered throughout the various pieces of legislation that govern the proceedings of the Court’²²⁹ necessitate, accordingly, a more comprehensive and scrutinized categorization.

Victims’ rights could be distinguished on the basis of a number of criteria, such as: 1) scope of applicability (applicable to all stages of the proceedings or confined to specific stages; of uniform applicability or case-specific); 2) level of definiteness (express or implied); 3) initiative for their employment (upon the victims’ initiative or upon the initiative of another); 4) nature of the corresponding obligation of the criminal justice authorities (positive rights, *i.e.* obliging certain action, or negative rights, *i.e.* obliging inaction); 5) manner of employment (in person or through another); 6) specificity of the right-bearer (any person qualifying as victim or only victims pertaining to a particular class, such as victim-participants, traumatized victims, victims of sexual violence, etc.).

In view of the foregoing, the rights of victims before the ICC could be classified as follows: 1) general and specific rights; 2) express and implied rights (rights stipulated explicitly and rights ensuing from the Court’s jurisprudence); 3) rights of an imperative character and rights of a non-imperative character; 4) conditional rights and non-conditional rights; 5) ‘passive’ rights and ‘active’ rights; 6) ‘positive’ rights and ‘negative’ rights; 7) rights employed in person and rights employed through another; 8) ‘any-victim’ rights and class- or group-specific rights; 9) ‘service’ rights and ‘procedural’ rights; 10) rights afforded solely to victims and rights afforded to victims and other persons alike.

Along these lines it should be mentioned that certain classifications may also comprise rights of a mixed character, that is, rights which, depending on the circumstances, may be employed in one variation or another. The present analysis will as well demonstrate that depending on the distinctive criterion, one and the same right could combine features pertaining to several classes of rights, thus, could fall within more than one classification simultaneously. Consequently, the different classes of rights which the eligibility as a victim before the ICC entails should be regarded as concomitant

²²⁷ See Mekjian and Varughese, *supra* note 9, where the authors distinguish between the victims’ ‘absolute right to attend within trial proceedings under Rule 91(2) and discretionary right to participate under Rule 91(3)(a)’ (footnotes omitted).

²²⁸ Paulina Vega González, ‘The role of victims in International Criminal Court proceedings: their rights and the first rulings of the court’, *SUR International Journal on Human Rights*, vol. 3(5) (2006), pp. 19-42, p. 22.

²²⁹ *Ibid.*, p. 21.

(coexistent) rather than as mutually exclusive. As a result, the diverse classes of rights are prone to various combinations.

1. General and Specific Rights

The first classification to be contemplated ensues from the criterion ‘applicability’. Determinative in this respect is the answer to the question whether a right is applicable throughout the criminal justice process as a whole or is confined to a specific stage and/or to specific proceedings.

1.1. General Rights

The ICC’s legal framework is rich in examples of rights of general applicability (*i.e. lex generalis*).²³⁰ In this respect, mention should be made of the right set forth in article 68(3) and its complementing provisions in the Rules, namely rules 89-93, all of which represent an apposite illustration of rights of general applicability. The right of victims to participation for the purpose of expressing their views and concerns is applicable at any stage of the ICC’s process, provided that the victims’ personal interests are affected by the stage/the proceedings at hand and determined to be appropriate by the Court. The same holds true as regards the corresponding provisions in the Rules.

In the same fashion, the right to counseling and other appropriate assistance as provided for in article 43(6), including the right of victims to assistance in obtaining legal advice and organizing their legal representation in accordance with rule 16(1)(b) are of a general character, applicable at all stages of the proceedings. Similar is the nature of the right to administrative and technical assistance pursuant to rule 18(c).

Another manifestation of a right of a general applicability is the right to protection as provided for in article 68(1) and rule 17(2). Victims’ right to protection is generally applicable from the early stages of the proceedings throughout the entire criminal justice process. Indicative in this regard is the obligation vested not only upon the Chamber in charge of the proceedings, but also upon the Prosecutor in the context of his or her investigation to ensure the protection of victims by virtue of article 54(3)(f).

²³⁰ See McDermott, *supra* note 33, p. 27.

In the same way, the right of victims set forth in rule 16(2)(a) and (b) to be informed of their rights afforded by law and of relevant decisions of the Chamber that may have an impact on their interests is also of a general character. Notably, the right to be informed and, in particular, to receive information about the progress of the case, is considered to be among the internationally accepted basic elements of fairness for victims.²³¹ Alongside the right to be informed is the right of victims to be notified. This right includes notification of developments in the criminal justice process in order to allow victims to apply for participation in the proceedings as stipulated by rule 92(2) and (3). To the same effect is the right to be notified of the date of hearings and of delivery of decisions, of the filing of requests, submissions, motions and other documents as envisaged in rule 92(5). The general character of the right to notification ensues from the very wording of rule 92, which stipulates that this right is applicable throughout the ICC's process, except for proceedings related to specific issues, envisaged in Part II of the Statute (*i.e.* the Prosecutor's request to the Pre-Trial Chamber for authorization of an investigation; challenges to jurisdiction and admissibility of a case).²³²

1.2. Specific Rights

Proceedings related to particular issues are, on their part, of narrow object and purpose. In other words, they are specific procedures. This feature implies limited intervention on the part of victims. Accordingly, the rights afforded to victims in proceedings of limited object and purpose are tailored to the specificities of the proceedings at hand. A common feature of the victims' *lex specialis* rights is their limited applicability, confined to a particular issue arising in the course of the proceeding or to a particular procedural stage (such as the pre-trial stage of proceedings or the reparations stage of a case following a conviction). The legal literature contains observations to the same effect, namely that 'in providing specific participatory rights to victims [...] the drafters [have] also expressly limited the scope of those rights.'²³³

²³¹ See *e.g.* Aldana-Pindell, *supra* note 226, p. 30, where the author refers to the Tenth Congress for the Prevention of Crime and the Treatment of Offenders, as well as to supranational, international and regional legal instruments, which stipulate the right to be informed among the core procedural rights of victims in the criminal justice process.

²³² See rule 92(1) read together with articles 5-21 (Part II of the Statute).

²³³ SáCouto and Cleary, *supra* note 20, p. 94.

At the beginning of the present chapter mention has been made of some specific rights afforded to victims like the right to make representations to the Pre-Trial Chamber concerning the Prosecutor's request for authorization of an investigation envisaged in article 15(3); the right to make observations in proceedings regarding challenges to the Court's jurisdiction or to the admissibility of a case set forth in article 19(3); the right to apply for reparations following a conviction as enshrined in article 75. Another specific right which ensues from the employment of the right to claim reparations is the right to appeal an order for reparations as envisaged in article 82(4).

An issue that is closely related to the present differentiation is how the general right to participation pursuant to article 68(3) relates to the specific rights to partake in proceedings of limited object and purpose envisioned in articles 15(3) and 19(3). Some authors advance the view that the right to make representations before the Pre-Trial Chamber, as stipulated by article 15(3), is to be interpreted as a 'particular specification' of the general right of participation envisioned under article 68(3).²³⁴ Others contend that the applicability of article 68(3) and, accordingly, of rules 89-93 to the proceedings of limited object and purpose of Part II of the Statute is not completely clear,²³⁵ since this issue 'was only touched upon very briefly in the discussions [related to the drafting of the Rules]'.²³⁶ Along with the contention that the Court is to decide whether participation pursuant to article 15 and article 19 should be confined to what is set out in these provisions or should be extended in accordance with article 68 and rules 89-93, it is observed that '[i]n any event, the right to make "representations" or "observations" [...] should not require a prior request and ruling by the Court under [r]ule 89.'²³⁷ In other words, it is averred that in order to exercise the right to intervene in the articles 15 and 19 proceedings, victims would not be required to undergo the formal application procedure for admission in proceedings.

Given the separate sets of provisions stipulating both the notification regime, as well as the manner of participation of victims in specific proceedings, on the one hand, and participation in general, on the other, it is to be inferred that the *lex generalis* regime

²³⁴ Mekjian and Varughese, *supra* note 9, p. 18.

²³⁵ Gilbert Bitti and Håkan Friman, 'Participation of Victims in the Proceedings', in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Roy S. Lee (ed.), 2001, Transnational Publishers, pp. 456-474, p. 459; Cohen, *supra* note 22, p. 359.

²³⁶ Bitti and Friman, *supra* note 235, p. 459.

²³⁷ *Ibid.*

and the *lex specialis* regime of victims' involvement are distinct and independent from one another. Accordingly, in proceedings of limited object and purpose the specific regime takes precedence over the applicability of the general regime. Consequently, the intervention of victims in proceedings pursuant to articles 15 and 19 rather than being contingent on the requirements set forth in article 68(3) and rule 89 *et seq.* must be in line with the relevant *lex specialis* provisions and their complementing rules.

This logic imbues the Court's legal instruments. To this effect is, for instance, rule 92(1) which explicitly envisions the non-applicability of the general provision on notification to victims in *lex specialis* proceedings. Another unequivocal indication in the same vein stems from the perusal of rules 50 and 59. These norms introduce alternative notification regimes to victims as regards the proceedings of article 15(3) and, accordingly, of article 19, separate and distinct from the general notification regime enunciated in rule 92. Furthermore, the wording of rule 89 itself makes an explicit reference to the participation of victims for the purpose of presenting their views and concerns, thus, excludes from its purview participation for the purpose of making representations and/or submitting observations. To the same effect is rule 91, which likewise makes an explicit reference to both rule 89 and article 68(3), thus, excludes from its ambit participation in proceedings pursuant to articles 15 and 19. The above considerations warrant the conclusion that the *lex specialis* regime of participation, that is, participation in proceedings of limited object and purpose, is separate and independent from the general regime governing the participation of victims enunciated in article 68(3).

1.3. Rights of Uniform Applicability and Case-Specific Rights

Besides the distinguishing features pointed out above, another distinction between the general and the specific rights conferred to victims is also to be noted. The general rights provided by the legal framework could be described as rights of uniform applicability. The *lex generalis* rights are applicable throughout any criminal justice process taking place before the ICC, irrespective of the particularities and of the development of a given situation or case. The uniform applicability of the right of victims to present their views and concerns to any ICC's proceedings pursuant to article 68(3) represents an apposite illustration in this respect. On the other hand, the *lex specialis* rights are case-specific.

Specific rights, such as the rights pursuant to article 15(3) and article 19(3), are related to a particular proceeding or issue which may or may not unfold in the course of a given criminal justice process. For instance, the applicability of the victims' right to make representations in proceedings pursuant to article 15(3) ensues from a Prosecutor's request to the Chamber for authorization of an investigation. Similarly, the right to make observations in proceedings pursuant to article 19(3) arises from a challenge to the Court's jurisdiction or to the admissibility of a case. In the same vein, the applicability of the right to claim reparations in subsequent reparation proceedings results from a conviction. Hence, unlike the rights of uniform applicability, the case-specific rights do not necessarily unfold in each and every criminal justice process taking place before the ICC. Whether they will find application or not in a particular ICC situation or case depends on the development of the proceedings at hand.

2. Express and Implied rights

The present division of rights is founded on whether a right is explicitly stipulated by the drafters or is identified and explained in the Court's jurisprudence instead. While express rights are meticulously and clearly fleshed out in the normative basis, implied rights derive from the interpretation of the legal framework. Since the explicit rights of victims are easily discernible through the perusal of the Court's legal instruments, the analysis will address directly the second group of rights within the present classification.

2.1. Implied Rights²³⁸

The review of the Court's jurisprudence reveals that the rights of victims enunciated in the case-law are aimed at giving effect to the victims' participation scheme carved out by the ICC's founders. It thus follows that the implied rights of victims emanate from the express right of victims to participation set forth in article 68(3). As such, implied rights are prone to differing interpretations as regards their exact substance and compass, varying from one

²³⁸ Implied rights must not be confused with inherent rights. The latter concept comprises rights of a fundamental character, *i.e.* essential, inalienable, natural rights. According to Black's Law Dictionary, Eighth Edition (2004), inherent or inalienable right is a 'right that cannot be transferred or surrendered [...] [that is] a natural right such as the right to own property'. Other examples of inherent rights are the right to life, as well as the right to liberty.

Chamber to another and depending on the circumstances of the case at hand.²³⁹ Victims' implied rights may thus be described as flexible.

A suitable illustration of an implied right provides the right of victims to access non-public information. The review of the relevant jurisprudence attests to varying interpretations of its exact substance and compass given by the different Chambers. Some Chambers sustain the view that the right to access information is encompassed by the right to consult the record of the proceedings as envisaged in rules 121(10) and 131(2), thus, is restricted to all public decisions and documents and 'does not extend to those filed on a confidential basis or, if applicable, under seal and/or *ex parte*'.²⁴⁰ Conversely, other Chambers acknowledge victims the right to access non-public information for the purpose of giving effect to article 68(3).

Notably, even among the Chambers that recognize the victims' right to access non-public information there is no unanimity as to the manner in which this right is to be employed, *i.e.* whether it could be exercised by the victims or should be confined to the victims' legal representative(s), as well as to what types of confidential materials this right relates. The majority of the Chambers have opined that the right to access non-public information is to be exercised through the victims' legal representative(s). In this strain in the *Bemba* case TC III has opined that victims have the right to be notified through their legal representative(s) of public and confidential filings which have a bearing on their personal interests. Pursuant to the Chamber's rulings, the legal representatives were obliged not to communicate confidential information to their clients without the permission of the Chamber.²⁴¹

The Trial Chamber in the *Katanga and Ngudjolo* case acknowledged the right of victims to access *via* their legal representatives confidential information except for

²³⁹ In the same vein is the observation advanced by commentators that the Chambers have adopted differing approaches as regards the rights of victims which are not explicitly provided for: what is not explicitly provided for is prohibited, what is not explicitly provided for is allowed. *See* Friman, *supra* note 25, p. 500.

²⁴⁰ *See Bemba*, PTC III, 12 December 2008, paras. 103 *et seq.*, as well as *Bemba*, PTC III, Decision on the Requests of the Prosecutor and the Legal Representatives of Victims for Re-classification of the Document Submitted by the Authorities of the Republic of South Africa and for Notification of Other Documents, ICC-01/05-01/08-480, 19 August 2009.

²⁴¹ *See Bemba*, TC III, Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, ICC-01/05-01/08-807, 30 June 2010, para. 47. *See also The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (Banda and Jerbo)*, PTC I, Decision on Victims' Participation at the Hearing on the Confirmation of the Charges, ICC-02/05-03/09-89, 29 October 2010, para. 62, where the Chamber underscored that it will decide on a case-by-case basis whether to grant access to confidential information 'upon receipt of a specific and motivated request, whether to grant victims' legal representatives access thereto'.

documents classified as *ex parte*.²⁴² The Chamber extended the compass of the information which the legal representatives could access on the victims' behalf to agreements pertaining to evidence between the Prosecutor and the defence as enunciated by rule 69.²⁴³

The Trial Chamber in the *Lubanga* case ruled that 'confidential filings which include the names of the legal representatives of the victims on their cover shall also be notified to the victims by the Registry.'²⁴⁴ However, TC I failed to specify whether the right to access confidential filings would extend to victims themselves or would be confined to their legal representative(s) only.

By contrast to the approach contemplated above, the jurisprudence of PTC I in the *Katanga and Ngudjolo* case initially favoured the recognition of access to confidential information to victims themselves. This ruling, however, engendered a variety of concerns among the parties, as well as with the Registry which observed that 'the victims are neither specifically trained in handling [...] sensitive information nor are they under a specific professional obligation to adhere to a code of conduct.'²⁴⁵ Subsequently, the Chamber revised its initial approach taking heed of these concerns together with the acknowledgement of the lack of a secure communication and storage of information, as well as of appropriate training of victims in handling sensitive information and maintaining confidentiality.²⁴⁶ As a result, PTC I ruled that the confidential part of the case record could be accessed by the victims' legal representatives and obliged the latter not to provide to their clients the information which would allow the identification of specific witnesses.²⁴⁷

Besides the right to access non-public information, other implied rights ensuing from the employment of the right to participation are: the right to respond to observations made in accordance with rule 103; the right to request the Chamber in charge of the proceedings to review the Prosecutor's decision not to initiate an investigation or not to prosecute within the context of article 53; the right to intervene in procedures concerning

²⁴² See *Katanga and Ngudjolo*, TC II, Decision on the Modalities of Victim Participation at Trial, ICC-01/04-01/07-1788-tENG, 22 January 2010 (*Katanga and Ngudjolo*, TC II, 22 January 2010), para. 121.

²⁴³ *Ibid.*, *Katanga and Ngudjolo*, paras. 121 and 124.

²⁴⁴ *Lubanga*, TC I, 18 January 2008, para. 107.

²⁴⁵ *Katanga and Ngudjolo*, PTC I, Decision on Limitations of Set of Procedural Rights for Non-Anonymous Victims, ICC-01/04-01/07-537, 30 May 2008, para. 4.

²⁴⁶ *Ibid.*, para. 21.

²⁴⁷ *Ibid.*, para. 25.

the preservation of evidence in the context of a unique investigative opportunity as envisaged in article 56; the right to request from the Chamber to execute its powers as regards the protection and privacy of victims and witnesses and the preservation of evidence as enunciated in article 57(3)(c); the right to take part in hearings on matters related to sentencing pursuant to rule 143.

Although rule 103 expressly bestows the right to respond to *amicus curiae* and other forms of submissions to the Prosecutor and to the defence, this right has been extended to victims subject to the discretion and the determination of the Chamber in charge of the proceedings.²⁴⁸ Similarly, although neither article 53, nor articles 56(3) or 57(3)(c) contain an explicit stipulation of victims' involvement in these proceedings, the possibility for victims to intervene therein for the purpose of implementing their right to participation finds reflection both in the Court's jurisprudence and in the relevant literature.

In this respect commentators observe that 'participatory rights can only be attached to articles 56 and 57 by application of article 68(3).'²⁴⁹ In the same spirit, the Court has proclaimed the possibility for victims to be afforded intervention in proceedings pursuant to article 56(3) or 57(3)(c) as ensuing from their right to participation endowed by the drafters.²⁵⁰ As regards the procedure of article 53, PTC II has held that the right of victims to request the review of the Prosecutor's decision not to initiate an investigation or not to prosecute is in tune with the rationale behind rule 92(2) read together with regulation 87 of the Regulations of the Court.²⁵¹ The relevant legal regime envisions that, in order to allow victims to apply for participation in the proceedings in accordance with rule 89, the victims or their legal representatives who have participated in the proceedings or who have communicated with the Court shall be notified of any decision of the Prosecutor not to initiate an investigation or not to prosecute. Although PTC I, on its part, did not grant the request of the victims' legal representative for a review of the Prosecutor's decision pursuant to article 53, it nevertheless did not deny, as a matter of principle, the possibility

248 *Bemba*, PTC II, Decision concerning the Application by the Legal Representative of Victims a/0278/08, a/0279/08, a/0291/08 to a/0293/08, a/0296/08 to a/0298/08, a/0455/08 and a/0457/08 to a/0467/08 filed on 20 April 2009, 22 April 2009 (*Bemba*, PTC II, Decision of 22 April 2009).

249 *Cohen*, *supra* note 22, p. 362.

250 *Kony et al*, PTC II, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101, 10 August 2007, paras. 97-98 and paras. 100-101; *Situation in the Republic of Kenya*, PTC II, Decision of 3 November 2010, para. 12.

251 *Situation in the Republic of Kenya*, Decision of 3 November 2010, at footnote 15.

for victims to intervene should the prerequisites for that arise.²⁵² The applicability of the general victims' participation scheme to article 53 has likewise been acknowledged in the literature by reference to rule 92(2). This provision has been identified as the legal text which connects article 53 with the victims' right of participation pursuant to article 68(3).²⁵³

Similarly, commentators have noted the implied nature of the right pursuant to rule 143 by observing that '[a]lthough it does not appear that victims may participate during closing statements, if the Court decides to hold a sentencing hearing, victims might be able to participate if requested to do so by the Chamber [footnote omitted].'²⁵⁴ As correctly averred, the right of victims to take part in additional hearings on sentencing matters is 'implied from the language of [r]ule 143'.²⁵⁵

Still, not all rights identified in the Court's jurisprudence as ensuing from the general victims' participation scheme pursuant to article 68(3) are beyond dispute. In particular, specific consideration necessitates the possibility of victims to contribute to the collection of evidence pertinent to the subject-matter of the case. In this context some Chambers have construed the meaningful participation of victims as entailing the right to tender evidence.²⁵⁶ As a result, the possibility of victims to impact the evidence-gathering process and, eventually, to affect the outcome of the case, has been expanded to an extent that blurs the distinction between the standing of the parties, on the one hand, and of victims, on the other. In view of the foregoing, the extent to which victims may intervene in the fact-finding process in proceedings on the merits remains a question open to discussion. Due to its complexity, the issue concerning the possibility of victims to partake in the fact-finding process, in particular, in the collection of evidence on the merits of the case is the focus of a separate and detailed analysis further below.²⁵⁷

²⁵² *Situation in the DRC*, PTC I, Decision on the request of the legal representative of victims VPRS 3 and VPRS 6 to review an alleged decision of the Prosecutor not to proceed, ICC-01/04-582, 25 October 2010.

²⁵³ Cohen, *supra* note 22, p. 362.

²⁵⁴ Aldana-Pindell, *supra* note 226, p. 34.

²⁵⁵ *Ibid.*, footnote 182.

²⁵⁶ *Lubanga*, TC I, Decision of 18 January 2008.

²⁵⁷ *See infra*, Chapter Five.

3. Imperative and Non-Imperative Rights

Next to be contemplated is the categorization distinguishing between imperative and non-imperative rights afforded to victims in the ICC's process. The classification criterion applied herewith is the enforceability of a right. That is to say, the rights are classified on the basis of whether the Chamber is duty-bound to ensure the employment of a particular right or, conversely, has the discretion to decide whether to allow victims to make use of the right in question. Hence, if the Chamber is obliged to allow the execution of a right, this denotes the mandatory, unqualified character of the right. Conversely, if the exercise of a right is subject to judicial discretion, the right is of a non-imperative, optional character.

3.1. Imperative Rights

The legislative approach enunciating victims' rights of an imperative character places the Chamber under the obligation to undertake action or to refrain from action which has a bearing on victims. Hence, a mandatory right ensues from the duty vested upon the Chamber in respect of victims, which may either be of a positive ('shall') or of a negative character ('shall not'). As rightly noted by legal scholars, the drafting history indicates that 'the choice of language 'shall' instead of alternatively 'may' is a deliberate one'.²⁵⁸

An eloquent manifestation of a victims' right of an imperative character is the right to participate at appropriate stages of proceedings whenever their personal interests are affected. The 'mandatory nature of the language' of article 68(3) has not gone unnoticed in legal literature.²⁵⁹ Commentators acknowledge that 'whenever all prerequisites [of article 68(3)] are met, participation in the form of expression of 'views and concerns' becomes a right granting which is an obligation upon a Chamber.'²⁶⁰ An assertion in the same vein has been advanced in the overall context of international criminal proceedings based on the understanding that incorporating victims' voice in proceedings is a

²⁵⁸ Sergey Vasiliev, 'Article 68(3) and personal interests of victims in the emerging practice of the ICC', *The Emerging Practice of the ICC*, Carsten Stahn and Göran Sluiter (eds.), Martinus Nijhoff, 2009, pp. 635-691, p. 648 (footnote omitted).

²⁵⁹ SáCouto and Cleary, *supra* note 20, p. 90.

²⁶⁰ Vasiliev, *supra* note 258, p. 648-649.

component of the mandate of international criminal tribunals.²⁶¹ Thus, when the conditions for participation are met the respective international judicial institutions are ‘duty-bound to enable victims to participate in their own right’.²⁶²

Besides article 68(3) other provisions which contain rights of an imperative character are: rule 87(2)(d) which envisions the right of a victim to respond to the Chamber when the latter, acting on its own motion, considers ordering measures to protect the victim concerned; rule 72(2) which empowers a victim to be heard and have his or her views taken into account by the Chamber when considering the relevance or admissibility of evidence concerning the victim’s alleged consent, words and conduct during the commission of an alleged crime of sexual violence; rule 119(3) which affords victims the right to have their views requested and taken into account by the Pre-Trial Chamber before imposing or amending conditions restricting liberty. Just as is the case with article 68(3), common to each of these provisions is the usage of the imperative ‘shall’ vesting a positive obligation upon the Chamber.

Also mandatory are the rights of victims stipulated in provisions employing the language ‘shall not’ with respect to the Chamber. This wording embodies an imperative that refrains the Chamber from action. Such, for instance, is the right of a victim of sexual violence not to have information concerning his or her prior or subsequent sexual conduct admitted as evidence in proceedings. This right is introduced through rule 71 placing an obligation upon the Chamber not to admit such type of evidence. Another example in the same vein is the victim’s right not to have an order for reparations delivered in his or her interest ensuing from the Chamber’s duty enjoined by virtue of rule 95(2)(b) not to make an order for reparations against the convicted person, upon the victim’s request.

A different example of a victims’ imperative right provides article 15(3). Although this norm does not vest an explicit obligation upon the criminal justice authorities as regards the right of victims to make representations, given the wording ‘victims may make representations to the Pre-Trial Chamber’, it is to be inferred that the enforcement of the right is left entirely to the discretion of victims. Therefore, as long as victims decide that they wish to avail themselves of their right pursuant to article 15(3), the Chamber is duty-bound to allow victims’ representations with respect to the Prosecutor’s request for authorization of an investigation. The same rationale underlies the victims’ right to submit

²⁶¹ Spiga, *supra* note 10, p. 1381.

²⁶² *Ibid.*

observations to the Court in proceedings with respect to challenges to the Court's jurisdiction or the admissibility of a case as envisaged in article 19(3), as well as the right to appeal against an order for reparations pursuant to article 82(4).

An imperative right ensues likewise from article 68(2), according to which when the Court considers to conduct any part of the proceedings in camera or allow the presentation of evidence *via* alternative means for the purpose of protecting a particular victim, such measures shall be implemented by the Chamber having regard particularly to the views of the victim concerned. Since the Chamber must consider the views of the victim concerned before proceeding with the implementation of protective measures, this implies an imperative right on the part of the victim to give and have his or her views considered by the Chamber before the latter reaches its determination. It thus becomes evident that even in the absence of an explicit wording obliging the Chamber to act or to refrain from action, a right bestowed on victims may still be categorized as being of an imperative character.

3.2. Non-Imperative Rights

By contrast, the alternative category of rights – those of a non-imperative, optional character – have no binding effect upon the Chamber. These rights are enforceable upon the discretion of the judicial body. The Court has the latitude to decide whether the exercise of the right in question is warranted and appropriate against the backdrop of the circumstances of the proceedings at hand. This approach is demonstrated and effectuated through the discretionary wording ‘the Chamber may’ as opposed to the imperative ‘shall’. Among the victims’ rights of a non-imperative character is the right to present their views on any issue as provided for by rule 93. According to this norm, the Chamber may seek the views of victims, hence, it is not obliged to do so. The same holds true as regards the right of victims to question witnesses, experts or the accused through their legal representative(s) which may only be exercised as long as the Chamber gives its authorization by virtue of rule 91(3)(a) and (b). This right of victims to contribute to the evidentiary material will be explored in more detail in a separate chapter in the context of the involvement of victim-participants in the ICC’s fact-finding procedure.²⁶³

²⁶³ See *infra*, Chapter Five.

4. Conditional and Non-Conditional Rights

Another classification which is worth considering is between conditional and non-conditional rights. As the notion ‘(non-)conditional’ implies, the present classification originates in the question of whether a right may be enforced automatically or is contingent upon certain requirements envisaged by the drafters.

4.1. Conditional Rights

The right to participation pursuant to the general victims’ participation scheme set forth in article 68(3) represents a right of a conditional character. The exercise of the right to take part in proceedings depends, first, on the victims’ admission following the application procedure set forth in rule 89 and, secondly, on the requirement that the victims’ personal interests are affected.²⁶⁴ The right to question witnesses in accordance with rule 91(2) and (3) is likewise conditional. The employment of this right is contingent on the appropriateness of the requested intervention assessed in light of a variety of factors, such as the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial. In addition, just like the participation of victims pursuant to article 68(3) for the purpose of presenting their views and concerns, rule 91(2) ‘makes clear that participation of the victims’ legal representative [in the examination of evidence] is subject to the Court’s ruling under [r]ule 89.’²⁶⁵

4.2. Non-Conditional Rights

By contrast, non-conditional are those rights which may be employed by victims autonomously, *i.e.* without prior judicial authorization. In other words, rights falling within this category are directly enforceable by the victims concerned. The stipulation of victims’ rights of an autonomous character reflects the understanding of the Court’s founders that certain instances throughout the criminal justice process may affect by their

²⁶⁴ In the same vein is the description of article 68(3) as a potential right premised on the observation that ‘[t]he victim, unlike the Prosecutor and the defence, is not entitled *as of right* to address the Chamber [emphasis added]’, *see* Jorda and de Hemptinne, *supra* note 1, p. 1405.

²⁶⁵ Mekjian and Varughese, *supra* note 9, p. 27.

very nature the victims' personal interests. Thus, the intervention of victims at particular instances has been deemed by the drafters to be *per se* warranted and appropriate, as a matter of principle. Instead of entrusting the Chamber with the discretion to decide on a case-by-case basis the appropriateness of victims' involvement, the drafters have granted in advance an express and a uniform authorization to victims to intervene whenever such specific instances arise.

Not surprisingly, bearing in mind the rationale behind the phenomenon of victims' participation at the ICC and the victims' non-party standing, the non-conditional rights bestowed by the legal documents are of limited scope. Accordingly, an example of an autonomous right is the victims' right to intervene in proceedings pursuant to article 15(3), as well as pursuant to article 19(3). Both the wording and the spirit of these provisions imply that, as long as the proceedings in question unfold, victims may enforce their respective right directly without further authorization by the Chamber or the fulfillment of additional conditions. In the same vein, commentators observe that 'the right to make "representations" or "observations" [...] follows directly from the Statute [thus] should not require a prior request or ruling by the Court'.²⁶⁶ That is to say, the exercise of the right to make representations or to submit observations takes place automatically without any further judicial assessment of the impact of the proceedings on victims and their personal interests, as well as the appropriateness of the intervention. Consequently, the intervention of victims pursuant to article 15(3) and article 19(3) is unconditional.

The logic behind this legislative approach is readily apparent. Due to their limited object and purpose, proceedings pursuant to article 15 and 19 are identifiable in terms of the issues which they entail and, accordingly, their impact on the victims' interests. Given the very specific nature of participation pursuant to these provisions,²⁶⁷ the matters which may arise therein may be anticipated beforehand and, as such, are prone to an exhaustive and express stipulation in advance. By the same token, the issues to which the proceedings in question relate are likewise identifiable beforehand. Hence, whether the issues, as envisaged by the drafters, affect the victims' personal interests and warrant the victims' intervention may likewise be ascertained in advance. For instance, the ICC's founders have pre-determined that the request of the Prosecutor for authorization of an

²⁶⁶ Bitti and Friman, *supra* note 235, p. 459.

²⁶⁷ McDermott, *supra* note 33, p. 33.

investigation, as well as challenges to the Court's jurisdiction and/or the admissibility of a case affect *per se* the personal interests of victims. Therefore, instead of being left to the determination of the Chamber, the right of victims to make (albeit a limited) contribution to these proceedings is deemed warranted and apposite by virtue of law.

5. Passive and Active Rights. Rights of a Mixed Character

Next to be addressed is the distinction between victims' 'passive' and 'active' rights. The distinguishing criterion is premised on the initiative triggering the execution of a right. As the wording 'passive' implies, this category includes those rights of victims the employment of which depends on the initiative of the Chamber or of the parties, as well as those rights which are effectuated through the Chamber or other organs of the Court. Conversely, if victims are the triggering force for the enforcement of a right and, thus, the right is exercised upon the victims' own initiative, such a right could be termed as 'active'.

5.1. Passive Rights

The first category comprises the rights pursuant to rule 93, according to which the Chamber may seek the views of victims or their legal representatives participating in proceedings, as well as of other victims on any issue, as appropriate. According to rule 93 victims may, upon the Chamber's discretion, be solicited to give their views in the context of, *inter alia*, proceedings upon request for review of the Prosecutor's decision not to initiate an investigation or not to prosecute (article 53(1) and (2), 53(3)(a) and rule 107); proceedings upon the initiative of the Pre-Trial Chamber to review the Prosecutor's decision not to initiate an investigation or not to prosecute (article 53(1) and (2), 53(3)(b) and rule 109); the decision of the Pre-Trial Chamber to hold a confirmation of charges hearing *in absentia* (rule 128); amendment of the charges (rule 128); joining or severance of proceedings (rule 136); proceedings on admission of guilt by the accused (rule 139). In a similar fashion is the right of victims pursuant to rule 224(1) and (4) to participate in the hearing on review concerning reduction of sentence or to submit written observations

upon invitation by the judges appointed by the Appeals Chamber for the purpose of the procedure pursuant to article 110(3).

Within the ‘passive’ rights category also fall the right of victims to be informed by virtue of rule 50 of the Prosecutor’s intention to seek authorization from the Pre-Trial Chamber to initiate an investigation pursuant to article 15(3); the right to be informed by virtue of rule 59 of any question or challenge of jurisdiction or admissibility which has arisen pursuant to article 19; the right to receive a notification for participation according to rule 92; as well as the right to be notified of reparation proceedings set forth in rule 96 (a special provision intended to ‘augment’ the general norm on notifications of rule 92).²⁶⁸

These rights rather than being effectuated by the right-bearer, *i.e.* the victims, are triggered by the relevant organ of the Court envisaged in the provision. For instance, the right to information and/or notification is carried out *via* the Registry by virtue of rule 16(1)(a) and rule 92(1). Similarly, the right to information and/or notification is effectuated through the Registry with respect to: protective measures ordered *proprio motu* by the Chamber pursuant to rule 87(2)(d); any question or challenge of jurisdiction or admissibility which has arisen according to article 19(3) as provided for in rule 59; the decision of the Chamber to proceed *proprio motu* with issues relating to reparations as envisaged in rule 95(1); publication of reparation proceedings under rule 96(1). The right to information and/or notification is triggered through the Prosecutor in the context of rule 50. The right to information and/or notification is triggered *via* the Court in the context of rule 92(2) and (3), *via* the Chamber - in the context of article 15(3) and rule 50(1).

Another passive right which is put in practice through the Chamber is the right provided in rule 119(3). Pursuant to this provision victims, who have communicated with the Court in respect to the case at hand and whom the Chamber considers could be at risk as a result of the release or conditions imposed on the alleged perpetrator, are afforded the right to give their views to the Chamber before the latter imposes or amends any conditions restricting liberty.

²⁶⁸ Peter Lewis and Håkan Friman, ‘Reparations to Victims’, in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Roy S. Lee (ed.), Transnational Publishers, 2001, pp. 474-492, p. 482.

5.2. Active Rights

By contrast, among the rights which are triggered by victims upon their own initiative are the right to intervene in proceedings pursuant to article 68(3) and the relevant rules; the right to participate in proceedings pursuant to articles 15 and 19; the right to apply for reparations in accordance with article 75; the right to appeal against an order for reparations according to article 82(4); the right to make opening and closing statements set forth in rule 89(1); the right to request protective measures for the purpose of giving effect to an order for reparations pursuant to rule 99; the right to consult the record of the case by virtue of rules 121(10) and 131(2).

5.3. Rights of a Mixed Character

Interestingly, the present classification accommodates a third category of rights that may be described as rights of a mixed character. This group encompasses rights which, depending on the circumstances at hand, may be exercised upon the initiative of victims or, conversely, upon the initiative of the Chamber or other organs of the Court. Such, for instance, is the victims' right to protective measures pursuant to rule 87. This norm unequivocally indicates that the implementation of protective measures may be invoked by the victim concerned, as well as by the Chamber of its own accord or by the parties.

The right to receive reparations is likewise of a mixed character. The legal framework provides for the possibility for reparation proceedings to be initiated by victims themselves in accordance with rule 94, as well as for the initiation of reparation proceedings *proprio motu* by the relevant Chamber by virtue of rule 95. As a result, victims may exercise their right to reparations either through the submission of a request for reparations pursuant to rule 94 or by joining reparation proceedings initiated by the Chamber according to rule 95. As rightly noted in legal literature, 'a victim who becomes aware that the Court is acting on its own motion and then submits a claim for reparations, will not be treated differently from a victim making a claim in the usual way [*i.e.* as envisaged in rule 94].'²⁶⁹ The mixed character of the right to reparations thus ensures that

²⁶⁹ *Ibid.*, p. 481.

‘even where [the victim] neglects to claim [...] reparations, the Court may take it upon itself to ensure that [the victim’s] rights are safeguarded.’²⁷⁰

6. Positive and Negative Rights

Following the distinction between ‘active’ and ‘passive’ rights, the rights bestowed to victims in the ICC’s process may further be categorized as ‘positive’ and ‘negative’ rights. The present classification distinguishes between: 1) rights which entitle victims to perform an action or to have an action performed in their interest and 2) rights which entitle victims to refrain from action and/or to request the criminal justice authorities to refrain from action.

6.1. Positive Rights

The perusal of the constitutive instruments demonstrates that most of the rights conferred on victims are of a positive character. A few examples of positive rights, among others, are the right to apply for participation in proceedings pursuant to rule 89, *i.e.* the victims’ right to have their applications reviewed and considered by the Chamber in charge of the proceedings; the right to apply for reparations set forth in article 75; the right to appeal an order for reparations according to article 82(4); the right to intervene in proceedings pursuant to article 15 and article 19; the right to be notified of developments in the proceedings in accordance with rule 92.

6.2. Negative Rights

On the other hand, within the negative rights category one could associate the right of a victim pursuant to rule 71 not to have evidence admitted in proceedings of his or her prior or subsequent sexual conduct; the right of a victim under rule 81(3) and (4) to request that his or her identity is not disclosed. Similarly, a right of a negative character is the right of a victim according to rule 95(2)(b) not to have an order for reparations made in his or her interest in the context of reparation proceedings initiated *proprio motu* by the Chamber.

²⁷⁰ Jorda and de Hemptinne, *supra* note 1, p. 1408.

The introduction of this right represents an effective response to concerns voiced by some delegations during the *travaux préparatoires* that victims who ‘would not wish to be seen as benefiting from ‘blood money’ would object ‘as a matter of conscience’ an order for reparations in their interest. This right likewise appeases the concerns of other delegations voiced during the drafting of the rules that the Court may seem to be intervening in an essentially civil matter, such as claims for reparations.²⁷¹

A further example of a victim’s right of a negative character is the right not to have (a) protective measure(s) implemented with respect to the victim concerned. Although this right is not readily apparent from the wording of the respective provisions, it is implied in the requirement that the victim concerned gives consent for the implementation of protective measures. Hence, protective measures could not be imposed on the victim even though they would be intended to safeguard his or her safety and well-being.

7. Rights Employed in Person and Rights Exercised Through Another. Rights of a Mixed Character

The perusal of the ICC’s victim-related provisions shows that whereas some rights may be employed by victims in person, other rights may be exercised either by victims themselves or through another. In addition, a further category of rights within the present classification is also to be outlined. This third group consists of rights that may be enacted on the victims’ behalf solely through another. While the legal framework stipulates explicitly whether certain rights are to be employed by victims in person and/or through another, other rights lack an express proviso in this regard. Therefore, the present distinction is premised on the interpretation of both the language, as well as the spirit of the victim-related provisions.

7.1. Rights Employed in Person

The rights which are to be exercised by victims in person logically relate to strictly personal, intimate values, such as the security, the protection, the well-being of the individual, as well as other issues which depend on the victim’s sole discretion.

²⁷¹ Lewis and Friman, *supra* note 268, p. 481.

Consequently within this category fall: the victim's right to participate for the purpose of expressing his or her views and concerns pursuant to article 68(3); the victim's right to give his or her views as regards protective measures considered by the Court in respect of him or her as provided for in article 68(2); the victim's right to decide whether to give consent or to oppose to protective or special measures which the Chamber considers to implement in respect of him or her according to rules 87 and 88; the right to freely choose their legal representative pursuant to rule 90(1); the victim's right to have his or her identity withheld from the public and/or the parties by virtue of rule 81(4). The same holds true as regards the right envisaged in rule 95(2) to request the Chamber not to proceed with an order for reparations against the convicted person in the interest of the victim concerned.

7.2. Rights of a Mixed Character

Numerous examples could be given in respect of the second category of rights within the present classification. A number of provisions stipulate that a victim's right may be employed in person or likewise through another. Such, for instance, is the right to file an application for participation, which, according to rule 89(3), could be carried out by the victim in person or by another with the victim's consent. Furthermore, the right to file an application could also be employed on behalf of the victim in case the victim is a child or disabled (depending on the nature and the extent of the impairment).²⁷² The right to request protective or special measures with respect to a particular victim may equally be exercised by the victim him- or herself and by his or her legal representative by virtue of rules 87(1) and 88(1). Similarly, the right according to rule 224(1) and (4) is of the same character. These provisions allow victims or their legal representatives to participate in the hearing concerning reduction of sentence or to submit written observations on the review concerning reduction of sentence conducted by the judges appointed for that purpose by the Appeals Chamber.

Within the second category of rights comprised by the present classification special attention should be drawn to the victims' right to participate in proceedings for the purpose of presenting their views and concerns as set forth in article 68(3). Given the

²⁷² *E.g.* diminished mental capacity and/or physical impairment which affect(s) his or her powers of discernment.

stipulation that the views and concerns of victims may be presented by the victims' legal representatives where the Court considers it appropriate, it becomes clear that the right to present the views and concerns of victims may be employed also by the victims' legal representative(s). Although, at first blush, the perusal of article 68(3) may engender the perception that the victims' appearance in person is the rule, while the presentation of the views and concerns through a legal representative is the exception, in fact such a standpoint is untenable. As the ICC's drafting history suggests, precisely due to concerns of many delegations 'that the potential numbers of victims could make their participation practically impossible [...] the modalities for exercising their right to participate in a given case were left in the hands of the Court.'²⁷³

As the phenomenon of victims' participation gains momentum at the ICC, the modality of participation that would safeguard the proper conduct of proceedings together with the precepts of due process, efficiency and expeditiousness is, indubitably, participation through a legal representative. Ensuring that the exercise of victims' rights is ingeniously adapted to the context of trials for mass crimes²⁷⁴ proves exigent, in particular given the overwhelming number of authorized victim-participants in the ICC's proceedings. Hence, notwithstanding the possibility for the expression of victims' views and concerns in person, the right of victims to participate for the purpose of presenting their views and concerns should, as a matter of principle, be employed *via* their legal representative.

In the same fashion, the relevant literature considers participation through joint legal representation as a 'logical means of accommodating [effective participation of] large numbers of victims' in international criminal proceedings.²⁷⁵ Said differently, 'because of the uniqueness of international crimes and the sheer number of anticipated victims there will always be an inherent collective aspect to participation.'²⁷⁶ This understanding echoes the acknowledgement made in the context of criminal proceedings in general that 'the unprecedented complexity of contemporary realities' represents a challenge to the traditional understanding of the right of victims to be heard.²⁷⁷

²⁷³ Bitti and Friman, *supra* note 235, p. 457.

²⁷⁴ Boyle, *supra* note 221.

²⁷⁵ *Ibid.*, pp. 310-311.

²⁷⁶ See McGonigle, *supra* note 362, p. 138.

²⁷⁷ Mauro Cappelletti, 'Vindicating the Public Interest Through the Courts: a Comparativist's Contribution', *Buffalo Law Review*, vol. 25 (1975-1976), pp. 643-690, p. 684 *et seq.* Equally true is the observation that the old scheme of merely individualistic 'procedural guarantism' must be transformed in order to meet/adapt to the

Undoubtedly, this is especially true in an international setting adjudicating the commission of mass atrocities. Thus, logically, the new realities unfolding at the international criminal justice scene entail changes of the traditional structures and long-accepted concepts, such as the right of the victim to address the Court in person.²⁷⁸

Some recent developments before the STL and the ECCC provide a rather telling illustration to the same effect. The review of these jurisdictions attests to a uniform and steadfast shift away from the initial approach favouring the personal appearance of victims in the criminal process towards indirect and collective participation, that is, participation through a common legal representative. At the ECCC, in response to the serious concerns²⁷⁹ raised by the participation of large numbers of civil parties in the *Duch* trial proceedings (known also as ‘Case 001’),²⁸⁰ the provision allowing the personal appearance of civil parties at a hearing has been repealed altogether in 2010.²⁸¹ Following this legislative amendment, at present the participation of civil parties at trial may take place only in a collective and proxy way, either through a civil party lawyer or through a victims’ association.²⁸² In fact, these amendments emanate from judicial findings in the same vein dating back to as early as 2008. Pursuant to the relevant jurisprudence at this time the participation of the civil parties in person was ruled out and was substituted by participation through the civil parties’ lawyer(s) strictly.²⁸³

changed needs of contemporary societies and the new phenomena. This, therefore, entails reconsideration and adaptation of the old principles to the new realities.

²⁷⁸ This right is widely recognized to victims who assume the standing of parties in proceedings. However, as will be seen shortly, some domestic jurisdictions also reveal a tendency towards restricting the right of the victim to appear in person due to consideration of time constraints and efficiency of proceedings.

²⁷⁹ E.g. backlog, fairness and expeditiousness of proceedings. See, in more detail, on this issue Studzinsky, *supra* note 200, Boyle, *supra* note 221. See also in the same vein, Mahdev Mohan, ‘The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal’, *International Criminal Law Review* 9 (2009), pp. 733–775, p. 755.

²⁸⁰ *The Prosecutor v. KANG Guek Eav alias Duch*, Case File/Dossier No. 001/18-07-2007-ECCC/SC.

²⁸¹ Thus, the ‘more permissive and lenient regime’ of the participation of civil parties characteristic of the proceedings at the beginning of the ECCC was subsequently considerably restricted – see Michelle Staggs Kelsall, Mary Kristerie A. Baleva, Aviva Nababan, Vineath Chou, Rachel Guo, Caroline Ehlert, Sovannith Nget and Savornt Pheak, ‘Lessons Learned from the ‘Duch’ Trial. A Comprehensive Review of the First Case before the Extraordinary Chambers in the Courts of Cambodia’ – a report produced by the Asian International Justice Initiative’s KRT Trial Monitoring Group (December 2009), p. 32.

²⁸² According to rule 23ter of ECCC’s Internal Rules, from the issuance of the closing order onwards civil parties can take part in proceedings only through a civil party lawyer. If representation ceases for any reason, the civil party should either engage alternative counsel or join an existing civil party group. Hence, except for interviews, civil party action is exercised exclusively through a lawyer.

²⁸³ See in more detail on this issue, Studzinsky, *supra* note 200, pp. 889-890, where the author notes that ‘[w]hilst at the very beginning, civil parties were given a right to speak personally and directly in the hearings [...] [w]hen the trial in [C]ase [001] [...] started, civil parties could only speak in person when they were summoned by the Court to testify.’

Although at the STL the right of victims to participation, just like at the ICC, exists in its two variations – in person and *via* a legal representative – still, the tribunal’s framework, as well as its jurisprudence reveal a tendency towards vicarious and collective participation almost exclusively. Indicative in this respect is rule 86(c)(ii) of STL’s Rules of Procedure and Evidence, which provides that ‘[a] victim participating in the proceedings may only do so through a legal representative unless the Pre-Trial Judge authorises otherwise.’²⁸⁴ The understanding that participation *via* a legal representative is the rule is likewise reflected in the relevant case-law.²⁸⁵

It is interesting to note that similar considerations aimed at ensuring the proper and professional conduct of proceedings in case of a large number of victims lacking legal expertise and professional skills inform the tendency towards vicarious participation in a number of domestic jurisdictions. In this respect, for instance, the relevant legal framework in Peru stipulates for the participation of common legal representative on the part of victims in cases where the number of victims could jeopardize the normal conduct of the proceedings.²⁸⁶ To the same effect, in criminal proceedings in El Salvador the intervention of victims as complainants (auxiliary accusers) takes place through a legal representative.²⁸⁷ The only exception to this principled stipulation is envisaged with respect to a victim who is a lawyer him- or herself.²⁸⁸ This legislative approach reflects the general understanding about the importance of the legal expertise of persons appearing as victims or on behalf of victims in proceeding.²⁸⁹ In the same vein is the regime governing criminal proceedings in the Dominican Republic, according to which the victim has the right to intervene as a civil party through a legal representative.²⁹⁰ In adherence to the same logic is the legislative approach in Taiwan, where the private prosecutor is obliged

²⁸⁴ As amended, 10 November 2010 and 8 February 2012. The previous version of rule 86(c) of STL’s Rules of Procedure and Evidence reads as follows: ‘The Pre-Trial Judge, after hearing the Prosecutor and the Defence through written submissions, shall rule on the matter. Where justified by the criteria in paragraph (B), he may limit the number of victims entitled to express their views and concerns in proceedings and shall appoint one or more common legal representatives for multiple victims except where this results in a conflict of interest. Unless authorized by the Pre-Trial Judge or a Chamber, as appropriate, a victim participating in the proceedings shall do so through a legal representative’ (10 June 2009).

²⁸⁵ See *Prosecutor v. Salim Jamil Ayyash et. al.* (Ayyash *et al.* case), STL-11-01/PT/PTJ, Decision on the VPU’s Access to Materials and the Modalities of Victims’ Participation in Proceedings, 18 May 2012 (Ayyash *et al.*, Decision of the Pre-Trial Judge of 18 May 2012), para. 20, where it is reiterated that authorized victim-participants in proceedings take part through their legal representatives. That is to say, vicarious participation is the rule.

²⁸⁶ Article 97 of the Criminal Procedure Code.

²⁸⁷ Article 107 of the Criminal Procedure Code.

²⁸⁸ *Ibid.*, article 110.

²⁸⁹ Spiga, *supra* note 10.

²⁹⁰ Article 118 of the Criminal Procedure Code.

to be represented in proceedings by a legal representative.²⁹¹ It is worth noting that if the private prosecutor has not retained an agent, the Court orders him or her to do so within a prescribed time period. Non-compliance with this judicial ruling is followed by the pronouncement of judgment of ‘Case not entertained’.²⁹² Hence, as a result, the participation of the private prosecutor is terminated.

In light of this succinct comparative note it becomes evident that the prevailing manner of employment of the victims’ right to participation pursuant to article 68(3) at the ICC is in tune with the overall tendency discussed above. Albeit the Court’s case-law acknowledges the possibility for the participation of victims in person premised on the wording of article 68(3),²⁹³ it favours, as a matter of principle, the presentation of the victims’ views and concerns by their legal representative(s). Taking into consideration the inimical impact which the personal appearance of a large number of victims could have on the expeditiousness and fairness of proceedings, quite understandably the Court has been cautious as regards the possibility for victims to be allowed to participate in person. The Court has held that this requires a fact-specific determination, taking into account the circumstances of the trial as a whole. Hence, the prevailing view in the ICC’s jurisprudence is that the personal participation of victims would be allowed only as an exception.²⁹⁴ In the *Lubanga* case, for instance, it has been opined that participation in person is the ‘exceptional course’, otherwise given the trial management implications of victims’ participation in person there would be real capacity for destabilizing the court proceedings.²⁹⁵ Furthermore, the personal appearance of victim-participants in proceedings could originate security concerns and would logically be time- and cost-consuming.²⁹⁶ As a consequence, the proper and timely conduct of proceedings would be affected in a negative way to the detriment of both parties, as well as of victim-participants themselves. Therefore, although the possibility for victims to appear in person

²⁹¹ Article 329 of the Criminal Procedure Code.

²⁹² *Ibid.*

²⁹³ *Lubanga*, TC I, Decision of 18 January 2008, para. 115.

²⁹⁴ *Lubanga*, TC I, Status Conference, 12 January 2009, ICC-01/04-01/06-T-101-ENG, page 43, lines 11-20.

²⁹⁵ *Ibid.*

²⁹⁶ In addition to the time which would be needed to put in place protective measures as regards victims wishing to appear in person in order to safeguard their safety, the VWU has estimated that in order for a victim to be brought to The Hague to participate in proceedings ‘35 days or more would be necessary in order to put in place all necessary steps for a secure transfer’ – see *Lubanga*, TC I, Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, ICC-01/04-01/06-2032-Anx, 26 June 2009 (*Lubanga*, TC I, Decision of 26 June 2009), para. 9(d).

has not been ruled out by the ICC, as a matter of principle, this possibility has been implemented on very rare occasions in practice.²⁹⁷

Conversely, given the legal representative's 'professional skills and code of ethics',²⁹⁸ the presentation of victims' views and concerns through a (common) legal representative would safeguard the expeditiousness, fairness and impartiality of proceedings. Thus, the employment of the victims' right to participation through a legal representative would ensure that 'the proceedings are conducted with at least a minimum degree of expedition and, above all, solemn decorum.'²⁹⁹ In addition, participation through a legal representative would allow a potentially high number of victims to avail themselves of their participatory rights in a meaningful way without compromising the core principles of procedural fairness and expeditiousness.³⁰⁰ The same rationale underpins rule 90(2), which envisages that for the purposes of ensuring the effectiveness of the proceedings the Chamber may request the victims or particular groups of victims to choose (a) common legal representative(s). This provision clearly reflects the correlation between victims' common legal representation and the imperative of expeditiousness.³⁰¹

7.3. Rights Employed Through Another

The third category within the present class of rights are those rights which are employed solely through the victims' legal representative(s). The perusal of the Court's normative

²⁹⁷ The personal appearance of three victims at a public hearing for the exclusive purpose of presenting their views and concerns has been authorized by TC III (*see* Transcript of open session hearing, ICC-01/05-01/08-T-227-Red-ENG CT WT, 25 June 2012). By contrast, in the proceedings before TC I and TC II the appearance of victims in the courtroom has been allowed solely for the purpose of giving testimony as witnesses. The issue of the so called 'dual status individuals', *i.e.* individuals who combine the status of victim with the capacity of witness in proceedings, will be examined in detail further below – *see infra*, Chapter Four.

²⁹⁸ Jorda and de Hemptinne, *supra* note 1, p. 1408.

²⁹⁹ *Ibid.*

³⁰⁰ *See e.g. Kony et al.*, PTC II, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 ICC-02/04-01/05-252, 10 August 2007, para. 80; *Bemba*, PTC III, Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims, ICC-01/05-01/08-322, 16 December 2008, para. 7; *Ruto et al.*, PTC II, First Decision on Victims' Participation in the Case, para. 24; *The Prosecutor v. Callixte Mbarushimana*, PTC I, Decision on the 138 applications for victims' participation in the proceedings ICC-01/04-01/10-351, 11 August 2011, para. 46; *Lubanga*, TC I, Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, para. 116; *Katanga and Ngudjolo.*, TC II, Order on the organisation of common legal representation of victims, ICC-01/04-01/07-1328, 22 July 2009, para. 11; *Bemba*, TC III, Decision on common legal representation of victims for the purpose of trial, ICC-01/05-01/08-1005, 10 November 2010, paras. 7, 23, 31, 33.

³⁰¹ William A. Schabas and Tatiana Bachvarova, 'The Contribution of the ICC to the Protection of Human Rights', *The Protection of Human Rights Through the International Criminal Court as a Contribution to Constitutionalization and Nation-Building*, collected volume funded by the German Ministry of Foreign Affairs, pending publication.

basis warrants the conclusion that this category comprises the right to attend and to participate in court hearings, as well as to file written observations or submissions according to rule 91(2); the right to question witnesses upon authorization by the Chamber by virtue of rule 91(3) and (4); the right to appeal against an order for reparations pursuant to article 82(4); the right to request postponement of additional hearing on matters related to sentence or reparations as envisaged in rule 143. The logic behind this legislative approach is premised on the fact that the exercise of the rights falling within this group necessitates legal proficiency. In other words, the employment of these rights is strictly reserved to the victims' legal representative in order to protect the rights of the accused³⁰² and, likewise, the integrity of the proceedings. As the Court itself noted, the ICC 'is a court of law and, in particular, this is the criminal trial of the accused, and the presumption is that those who participate in the proceedings will be lawyers [...] acting for [victims].' Otherwise, as it may be expected, the lack of a legal training of persons appearing before the Court and intervening in complex legal issues 'could have a real capacity for destabilising [the] court proceedings.'³⁰³ Therefore, as duly noted in the relevant literature, the enhanced procedural rights of victims require the assistance of a legal representative.³⁰⁴

8. 'Any-Victim' Rights and Group-Specific Rights

The present classification distinguishes between rights which relate to any person who qualifies as a victim according to rule 85 and rights the exercise of which is restricted to certain classes (groups) of victims. Said differently, the latter category comprises rights that emanate from a specific distinguishing feature of the victim concerned, such as a victim of a sexual violence; a traumatized or a vulnerable victim; a victim-participant in proceedings on the merits of the criminal case; a victim-participant in reparation proceedings, etc. Consequently, as correctly noted in literature, 'not [...] all those who fall

³⁰² Baumgartner, *supra* note 22, p. 430.

³⁰³ *Lubanga*, TC I, Status Conference, 12 January 2009, ICC-01/04-01/06-T-101-ENG, page 43, lines 11-20; *Lubanga*, TC I, Decision of 26 June 2009, para. 40, where the Chamber observed that submissions concerning complex legal issues are to be advanced by the legal representative.

³⁰⁴ Baumgartner, *supra* note 22, p. 430.

within the [inclusive general victim definition] are entitled [...] to all the rights contained in the Statute and the Rules for victims.’³⁰⁵

8.1. ‘Any-Victim’ Rights

Common characteristic of the first group of rights is that they are endowed to any victim in general. This group of rights comprises, among others, the right to apply for participation pursuant to the general victims’ participation scheme as provided for in rule 89; the right to protection pursuant to article 68(1); the right to make representations with respect to the Prosecutor’s request for authorization of an investigation to the Pre-Trial Chamber according to article 15(3) and rule 50.

Notably, within the first category of rights falls likewise the right to apply for reparations pursuant to article 75(2). This is due to the well-established fact that the right to claim reparations may be exercised by any victim wishing to receive indemnification for the harm sustained as a result of the crimes charged, irrespective of whether that victim has availed him- or herself of the right to participate in the proceedings on the merits of the criminal case. In other words, the right to claim reparations is not restricted only to victim-participants in the proceedings adjudicating the individual criminal responsibility of the accused. At this point it should be noted that the opposite holds likewise true. Participation in proceedings on the merits of the criminal case is separate and independent from a claim for reparations for the harm allegedly suffered.

These characteristics of the right to claim reparations, in particular, its ‘any-victim’ character are an essential feature that distinguishes the ICC’s reparations regime from the reparations procedure set forth, for instance, at the ECCC.³⁰⁶ As previously observed, the civil parties’ interest in indemnification is one of the two main purposes of civil party action in the criminal proceedings taking place before the Cambodia tribunal.³⁰⁷ It thus follows that the participation of civil parties in proceedings on the merits of the case is contingent on a claim for reparations against the accused. Consequently, by contrast to the

³⁰⁵ SáCouto and Cleary, *supra* note 20, p. 91, footnote 82, referring to Women’s Caucus for Gender Justice.

³⁰⁶ By contrast to the ICC, the STL – the other international criminal justice body that affords victims the possibility to take part in proceedings in their own right – does not provide victim-participants with the right to claim reparations. Therefore, the present comparative note is confined only to the juxtaposition between the ICC and the ECCC.

³⁰⁷ Rule 23(1)(b) of the Internal Rules (amended on 5 September 2008, 6 March 2009, 11 September 2009, 9 February 2010 and 17 September 2010).

victims' right to claim reparations before the ICC, the right to claim reparations and the right to participate in the ECCC's proceedings are intertwined. That is to say, the right to claim reparations is confined to victims who assume civil party standing in the criminal justice process.

The distinct scope of the right to claim reparations before the ICC as compared to the ECCC is a logical reflection of the fact that reparation proceedings at the ICC are governed by a separate cluster of provisions, namely article 75 and the corresponding provisions of the Rules, *i.e.* rule 94 *et seq.*, while this is not the case at the ECCC. In addition, an order for reparations at the ICC does not form part of the judgment on the merits (more precisely, of the conviction), whereas at the ECCC a decision on the civil party claims is to be made in the judgment, as stipulated by rule 100 of the Internal Rules.

In conclusion, it is worthwhile considering that each of the two approaches on the right to reparations contemplated above has its counterpart in a domestic setting. For instance, besides the Cambodian legal system, similar to the ECCC is also the system in the Philippines where civil party action is an automatic corollary of the institution of criminal proceedings. More specifically, the civil action for the indemnification of the harm suffered as a result of the offense(s) charged is, in principle, deemed instituted with the criminal action, unless the victim waives the right to claim reparations or reserves the right to institute civil action separately from the criminal proceedings or institutes civil action prior to the criminal action.³⁰⁸

On the other hand, equivalent to the reparations regime set forth by the ICC's constitutive instruments is, for instance, the legislative approach in Bolivia. Victims who have not taken part in proceedings adjudicating the individual criminal responsibility of the accused are entitled to apply for reparations to the Judge who pronounced the sentence within three months of having been informed of the final sentence.³⁰⁹ Similar is the situation in Nicaragua, where a civil claim can only be lodged following a final conviction and sentence.³¹⁰ The claim is to be filed before the same judicial authority which has adjudicated the proceedings on the individual criminal responsibility of the accused.³¹¹

³⁰⁸ Rule 111(1) of the Rules of Criminal Procedure.

³⁰⁹ Article 382(2) of the Criminal Procedure Code.

³¹⁰ Article 81 of the Criminal Procedure Code.

³¹¹ *Ibid.*

8.2. Group-Specific Rights

Turning back to the ICC, the second category of rights to be considered within the present classification are the group-/(class-)specific rights. Rights falling within this category are rights which may be employed solely by a particular group/class of victims. An example of a right that may be employed only by victim-participants is the right to present views and concerns pursuant to article 68(3) and the complementing rules. Said differently, only successful victim-applicants, *i.e.* victims admitted as participants in proceedings following the application procedure set forth in rule 89, are entitled to make use of the right to present their views and concerns in the course of the proceedings. Logically, the rights which ensue from the right to participation are, in principle, likewise restricted to victim-participants. Among those rights are: the right pursuant to rule 90 to choose freely a legal representative; the right according to rule 91 to have their legal representative participate in proceedings, including the right to question witnesses; the right envisaged in rule 92(6) to be notified of decisions of the Court delivered at stages of the proceedings in which victims or their legal representatives have taken part; the right pursuant to rule 93, first sentence, to give their views upon an invitation by the Chamber on any issue; the right to consult the record of the case in accordance with rule 121(10) and 131; the right pursuant to rule 224(1) to participate in the hearing or to submit written observations in the context of procedure for review concerning reduction of sentence.

In addition to victim-participants, the purview of some rights includes likewise the so called ‘victims who have communicated with the Court’ in relation to the situation or the case at hand. Admittedly, according to the Court’s jurisprudence, this group of victims is broader than victim-participants in the strict sense. Victims who have communicated with the Court, ‘whilst not having (as yet) been allowed to participate in proceedings, have nevertheless been in contact with the Court.’³¹² Consequently, victims who have communicated with the Court with respect to the situation or the case at hand are not necessarily (only) victim-participants pursuant to article 68(3). A group-specific right equally afforded to victim-participants and to victims who have communicated with the Court is, for instance, the right to receive notification set forth in rule 92(2) and (3).

³¹² *Kony et al.*, PTC II, 10 August 2007, para. 93.

Other group-specific rights are the rights ensuing from participation in reparation proceedings. Only victims who take part in reparation proceedings, *i.e.* victims claiming reparation, are entitled to the following rights: the right to request assessment of reparations pursuant to rule 97; the right to request that the Court does not proceed with a reparation order under rule 95(2)(b); the right to receive a copy of the reparations order according to rule 218(4); the right to request the Chamber to determine the necessity, if any, for protective measures for the purpose of forfeiture pursuant to rule 99; as well as the right to be consulted by the Presidency on matters related to the disposition and/or allocation of property or assets envisaged in rule 221; the right to appeal against an order for reparations pursuant to article 82(4). A common feature of the above enumerated group-specific rights is that they may only be executed by victims who have participated in proceedings on reparations. This is due to the fact that only this group of victims are affected by the outcome of the reparation proceedings. Consequently, any other victim who has not participated in the proceedings on reparations has no legal standing therein, thus, is not entitled to the rights pointed out above.

Other group-specific rights are the rights which belong exclusively to victims of sexual violence. Among those rights are the rights pursuant to rules 71 and 72, to which mention has already been made, as well as the right to have special assistance and gender-sensitive measures provided by the Registry facilitating the participation of such victims in proceedings as provided for by rule 16(1)(d) and the relevant regulations of the Regulations of the Court.

9. Service Rights and Procedural Rights

A further differentiation of the rights which victims may exercise throughout the ICC's process to be addressed herewith ensues from the classification between procedural rights and service rights.³¹³ The latter category implies rights which enable victims to keep abreast with the developments of the criminal justice process and the progress of the proceedings, as well as to avail themselves of assistance and other appropriate services provided by the Court's organs throughout the proceedings.

³¹³ See Carolyn Hoyle and Lucia Zedner, 'Victims, Victimization, and Criminal Justice' in *Oxford Handbook of Criminology*, Maguire *et al.* (eds.), Oxford University Press, 2007, pp. 461-488, p. 474. See further Yvonne McDermott, 'Victims and International Law: Remedies in the Courtroom?', *Hague Justice Journal*, vol. 4:3 (2009), pp. 199-213.

9.1. Service Rights

The notion ‘service rights’ may be regarded as having originated in the context of domestic proceedings. The relevant legal literature observes that such rights are aimed at ‘improving the experience the victim has of the criminal justice system’.³¹⁴ Consequently, service rights are those rights which entail support for victims by the criminal justice authorities in the broadest sense of the word.³¹⁵ Service rights are considered to be ‘largely neutral in due process terms’,³¹⁶ since, albeit they ‘ameliorate the criminal process for victims’,³¹⁷ they do not afford victims a means of making an impact on the process itself.³¹⁸ Hence, service rights ‘refer to services to victims which do not affect procedure’.³¹⁹

One palpable example of a service right is the right to information envisioned in rule 92.³²⁰ Pursuant to this provision, in order for victims to avail themselves of the right to apply for participation and to take part in the proceedings, they should be notified accordingly. It is important to note that the right to information is largely acknowledged as a service right of a ‘particularly significant nature’.³²¹ Such a standpoint is hardly surprising bearing in mind that the right to receive information, especially about the progress of the case, forms part of the internationally accepted basic elements of fairness for victims.³²² In fact, the importance of the right to be informed goes beyond the realm of participation in (international) criminal proceedings. The need to be properly informed has been addressed in the broader context of citizen participation, also referred to as ‘participation of the governed in their government’,³²³ as early as the 1970s. The relevant literature has acknowledged that ‘[i]nforming citizens of their rights, responsibilities, and

³¹⁴ Helen Fenwick, ‘Procedural ‘Rights’ of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?’, *The Modern Law Review*, vol. 60:3 (1997), pp. 317-333, p. 321.

³¹⁵ See in this aspect Sam Garkawe, ‘The Victim-Related Provisions of the Statute of the International Criminal Court: A Victimological Analysis’, *International Review of Victimology* 8 (2001), pp. 269-289, at pp. 282-283, where the author suggests a division between victim-related provisions in the ICC’s legal framework relevant to victim support before and during the proceedings and protection-related provisions.

³¹⁶ *Ibid.*, p. 322.

³¹⁷ Fenwick, *supra* note 314, p. 319.

³¹⁸ *Ibid.*

³¹⁹ Hoyle and Zedner, *supra* note 313, p. 474.

³²⁰ See in the same vein, Fenwick, *supra* note 314.

³²¹ *Ibid.*, p. 326.

³²² *Ibid.*

³²³ Sherry R. Arnstein, ‘A Ladder Of Citizen Participation’, *Journal of the American Institute of Planners*, vol. 35:4 (1969), pp. 216-224, p. 216.

options' is 'the most important first step toward legitimate citizen participation.'³²⁴ It thus becomes evident that, in order to make use of one's rights, a person must be aware, *i.e.* must be informed, of their existence. Consequently, '[i]n order to enable victims' full exercise of their inherent rights',³²⁵ the dissemination of the relevant information prior and throughout the duration of trials proves indispensable.

Besides the right to information as set forth in rule 92, equally attributable to the service rights category are the right to protective and special measures envisaged by the ICC's legal framework, as well as the right to counseling, legal advice and assistance as provided for in rules 16(b)(c), 17(a)(i)(ii)(iii) and 18(b), and regulation 81 of the Regulations of the Court. The Regulations of the Registry contain further examples of service rights with respect to victims, such as the right to: relocation, accompanying support persons, dependent care, extraordinary allowances, transportation, accommodation; the right to receive support, including in the field, such as psychological, social assistance and advice, allowances.³²⁶

9.2. Procedural Rights

The procedural rights, on their part, afford victims an opportunity to get involved in the criminal justice process, to have their voices heard and, accordingly, to make their impact and/or contribution to the criminal justice process to the extent envisaged by the legislator. Consequently, the procedural rights category encompasses among others: the right to participation *stricto sensu* set forth in article 68(3) and its complementing rules; the right to access to judicial review within the context of reparation proceedings in accordance with article 82(4); the right to make representations and submit observations as provided for by articles 15(3) and 19(3); the right to give their views as regards procedural matters upon the invitation of the Chamber according to rule 93; the right to have their views sought by the Chamber before imposing or amending any conditions restricting liberty pursuant to rule 119(3).

³²⁴ *Ibid.*, p. 220.

³²⁵ Gioia Greco, 'Victims' Rights Overview under the ICC Legal Framework: A Jurisprudential Analysis', *International Criminal Law Review*, vol. 7 (2007), pp. 531-547, p. 541.

³²⁶ See Regulation 79 *et seq.* of the Regulations of the Registry.

It is beyond the shadow of a doubt that the service rights and the procedural rights of victims are intertwined.³²⁷ The entitlement of victims to service rights throughout the ICC's proceedings enables the proper exercise of their procedural rights.³²⁸ To illustrate by reference to the core service right – the right to information – unless victims are informed in a timely and accurate manner about the criminal proceedings taking place, as well as of the options for involvement conferred upon them by the ICC's normative basis, victims would not be in a position to make an informed choice and to decide, accordingly, which way to proceed.

10. Exclusive and Non-Exclusive Rights

The review of the Court's normative basis warrants a further distinction of the rights conferred to victims in the course of the proceedings, namely, between rights afforded exclusively to victims and rights afforded to victims and other persons alike. While victims are the sole bearers of the majority of the victim-related rights pursuant to the constitutive instruments, still, certain rights pertaining to victims may likewise be employed by a wider group of persons, such as other non-party participants or even persons who are extraneous to the proceedings at hand.

10.1. Exclusive Rights

That said, the right to participation pursuant to the general victims' participation scheme belongs exclusively to victims. The same holds true with respect to the right to partake in proceedings of limited object and purpose, such as those envisaged in articles 15, 19, and reparation proceedings.

³²⁷ In the same vein, commentators observe that service rights have procedural implications. *See* Hoyle and Zedner, *supra* note 313, p. 474.

³²⁸ *See* in the same vein González, *supra* note 228, p. 26, where the author describes the right to notification and publicity of proceedings as 'subsidiary rights' to the right to participation and contends that these subsidiary rights are fundamental to assure that victims can exercise their right to participation.

10.2. Non-Exclusive Rights

By contrast, the right to protection is endowed to victims, as well as to members of their families, witnesses and any other person at risk on account of a testimony or the activities of the Court. This inference is premised on the analysis of article 54(3)(f) which obliges the Prosecutor to take or to request from the Chamber in charge of the proceedings measures for the protection of any person who is at risk. In the same fashion are rules 81(4) together with rules 87 and 88, all of which include within their purview victims, witnesses, as well as other persons at risk.

Within the latter category of rights also worth noting is the right set forth in article 82(4). The scope and the application of this right go further than the other non-exclusive rights discussed hitherto. Article 82(4) entitles a *bona fide* owner of property adversely affected by an order for reparations to appeal that order as long as it adversely affects him or her. Accordingly, besides victims, the right to appeal an order for reparations is also explicitly afforded to a person who is extraneous to the proceedings at hand (yet is adversely affected by their outcome).

11. Rights Falling Within Several Classifications

In view of the classifications of the rights of victims suggested by the present analysis, it becomes apparent that one and the same right may belong to several classifications simultaneously, depending on the criterion applied. For instance, article 82(4) in addition to being a right of a non-exclusive character is also a specific right (*i.e.* afforded only to victims claiming reparations) of an imperative character. Article 82(4) is also a right of a positive character, the employment of which is triggered by the victim him- or herself. In addition, this right falls within the category of rights effectuated only through a legal representative.

Other examples of rights which are assigned to several categories are the victims' right to make representations pursuant to article 15(3) and to submit observations according to article 19(3). They both represent non-conditional, case-specific rights of an imperative and of a positive character.

The right of victims under rule 93 to have their views requested on any matter by the Chamber and the right of victims set forth in rule 119(3) to have their views requested and considered by the Chamber before imposing or amending any conditions restricting liberty both represent passive rights. However, while the former also falls within the category of rights of a non-imperative character, the latter represents a right of an imperative character.³²⁹

Before proceeding with the detailed analysis of each of the components of article 68(3), the victims' rights' classification suggested hitherto identifies the right to participation as a positive right of a uniform applicability, of a conditional and, at the same time, of an imperative character. As previously discussed, indicative in this respect is the wording of article 68(3) 'where the victims' personal interests are affected' (manifesting the conditional character of the right) and 'shall allow and consider' the views and concerns of victims (manifesting both the imperative and the positive character of the right). Consequently, 'whilst the judicial decision under [a]rticle 68(3) is overall not discretionary, the Court possesses [still] substantial discretion to determine whether the particular elements of the test have been established [footnotes omitted]'.³³⁰ The imperative feature of the right dictates that once the Chamber reaches a positive determination that the victims' personal interests are affected, it is duty-bound to enforce the victims' right to participation.

³²⁹ By contrast to the wording 'may' used in rule 93, the wording employed in rule 119(3) is 'shall'.

³³⁰ Vasiliev, *supra* note 258, p. 649.

CHAPTER THREE

Purpose and Substance of Article 68(3)

Within the classification of the rights bestowed on victims by the Court's normative basis the right to participation pursuant to article 68(3) distinguishes itself as an embodiment of the fundamental regime of the engagement of victims in proceedings before the ICC. Article 68(3) reflects the views of the drafters about the role and the place of victims in the overall design of the ICC's process by explicitly delimiting the contours of their participation, its substance and extent. Thus, as widely acknowledged, this norm represents the cornerstone, the foundation of victims' involvement in proceedings.

As previously noted, article 68(3) conditions the right to participation through the presentation of views and concerns on the fulfillment of the following cumulative requirements: 1) the victims' personal interests must be affected by the proceedings at hand; 2) the procedural stage at which participation is sought must be deemed appropriate by the Chamber in charge of the proceedings; 3) the participation of victims must be conducted in a manner not inconsistent with or prejudicial to the rights of the accused and a fair and impartial trial.

1. Insight into the Origins of Article 68(3)

Before embarking on the analysis of each separate element of the victims' right to participation for the purpose of presenting their views and concerns, first, the origins of article 68(3) should be discussed comparatively. Notwithstanding its unprecedented nature in the realm of international criminal justice,³³¹ this normative text mirrors the language of article 6(b) of the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power ('the 1985 UN Declaration', 'the Declaration'),³³² also hailed as 'the Victims' Magna Carta'.³³³ This explicit stipulation in an international legal

³³¹ The novel nature of the standing of victims as participants in their own right before the ICC has been discussed in detail in the preceding chapters.

³³² See e.g. Donat-Cattin, *supra* note 13, p. 1279; Lubanga, Separate Opinion of Judge Georgios M. Pikis to the Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, ICC-01/04-01/06-925, 13 June 2007 (Separate opinion of Judge G.M. Pikis to the Decision of the Appeals Chamber of 13 June 2007).

³³³ Stover *et al.*, *supra* note 2, p. 512.

instrument of the right of victims to convey their views and concerns is an essential acknowledgment of the fact that victims have their own stake in the criminal justice process, national and international alike.

The right to express their views and concerns in the course of the proceedings endows victims with the possibility to have a say in the arena of criminal justice. Accordingly, victims' right to participation is an emanation of the right to 'allocation', that is, of the right to have their voices heard. Victimological studies ascribe the origins of the procedural justice concept 'voice' to the late 1970s when it was introduced 'as a procedural determinant in the literature related to procedural justice [...] aimed at replacing the term "process control"'. According to commentators, 'voice' or 'process control' represent 'the opportunity to be involved, [to] express one's concerns and to be heard'³³⁴ in the course of the criminal proceedings. Hence, it is essential to note that the 'procedural justice concept of voice not only concerns the opportunity to speak, but also to be heard.'³³⁵

Article 6(b) of the 1985 UN Declaration provides an eloquent manifestation of the right of victims to have a voice in the realm of criminal justice. The Declaration is drafted as a basic legal document embodying overarching precepts of access to justice and fair treatment of victims of crime, lying at the heart of modern jurisdictions. As the Declaration itself proclaims, it 'is designed to assist [g]overnments and the international community in their efforts to secure justice and assistance for victims of crime and victims of abuse of power'.³³⁶ Article 6(b) of the Declaration, therefore, enunciates tenets of a universal character aimed at providing guidance to contemporary criminal justice systems in facilitating 'the responsiveness of judicial and administrative processes to the needs of victims'.³³⁷ As such, this legal text is of a general character and is thus equally applicable to different judicial systems, irrespective of the legal tradition to which they relate. As duly noted in literature, 'the victim-oriented norms at the international level consist principally of general recommendations on granting victims access to justice that also

³³⁴ Tinneke Van Camp and Jo-Anne Wemmers, 'Victim satisfaction with restorative justice: More than simply procedural justice', *International Review of Victimology*, vol. 19 (2013), pp. 117-143, p. 124; Stover *et al.*, *supra* note 2, p. 513.

³³⁵ *Ibid.*, Van Camp and Wemmers, p. 128.

³³⁶ 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Preamble, article 3.

³³⁷ See article 6(b) of the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

contemplate significant flexibility for state compliance.³³⁸ Consequently, article 6(b) of the Declaration is not to be imported wholesale and/or verbatim into any distinct system. Instead, the precise implementation and application of the principles articulated in the provision should be tailored to the specific nature of the respective jurisdiction.³³⁹ Hence, the 1985 UN Declaration leaves room for differing interpretations. The specific decision as to the extent to which victims can be involved in the decision-making process in a domestic setting is left to the discretion of the national legislator.

Indubitably, modern legal systems are the result of the migration of legal ideas and trends and are thus all mixed to some extent.³⁴⁰ Notwithstanding the convergences taking place between the two main legal traditions prompted in part by the growing importance of supranational institutions and international human rights norms,³⁴¹ the continental - common law dichotomy is still noticeable depending on the prevalent disposition of jurisdictions towards precepts lying at the heart of the civil law or the common law tradition. Since the comparison between legal systems entails observing and explaining differences and similarities alike,³⁴² it is worth noting that the right of victims to play a role and have a say in the course of the proceedings is reflected in each of the two leading criminal justice paradigms. The differences, however, lie in the manner and the extent to which victims are integrated within the criminal justice process. Although the right of victims to have their voices heard is introduced in both common law and continental criminal proceedings, it is implemented differently. The manner, the substance and the extent of the intervention of victims in proceedings vary depending on the specificities of the criminal jurisdiction and the ulterior goal of victims' participation therein. The common law approach is premised on the more ritualistic idea of affording victims an access to a forum where their voices will be heard and their victimhood will be acknowledged.³⁴³ By contrast, continental jurisdictions enjoin victims with a more pragmatic role which extends to the possibility to directly impact the fact-finding process

³³⁸ Aldana-Pindell, *supra* note 226, p. 1409.

³³⁹ See in the same spirit article 6(b) of the UN Declaration.

³⁴⁰ Schlesinger *et al.*, *supra* note 17, p. 12.

³⁴¹ *Ibid.*, p. 287.

³⁴² *Ibid.*, p. 37.

³⁴³ Mary Margaret Giannini, 'Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims' Rights Act', *Yale Law and Policy Review*, vol. 26 (2007-2008), pp. 431-484, p. 452. See also in the same vein, Peggy M. Tobolowsky, 'Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime', *New England Journal on Criminal and Civil Confinement*, vol. 25 (1999), pp. 21-105.

and, eventually, the outcome of the case. In continental jurisdictions victims' involvement comprises matters pertaining to the core of the subject-matter of the proceedings, while within the common law model victims have a say on issues falling outside the heart of the subject-matter of the case and, as such, are not central to the case.

Common law jurisdictions of today tend towards affording victims a greater say in the criminal justice process, which, however, does not transform them into parties or quasi-litigants.³⁴⁴ By comparison with civil law jurisdictions, the right of victims to partake in proceedings is considerably limited. Victims enjoy the right to present their views and concerns to the criminal justice authorities (police, Prosecutor, the Court)³⁴⁵ through the submission of victim statements, also known as victim impact statements³⁴⁶ or victim personal statements.³⁴⁷ Hence, victims' right to allocution is mainly employed through the submission of statements that afford victims the possibility to reflect the impact of the offence on them and/or their families (in physical, psychological, social, emotional and etc. aspects). If submitted at the initial stages of the criminal process, the views and concerns of victims are to be considered by the police and/or the Prosecutor for the purpose of the future case.³⁴⁸ Some jurisdictions envisage the possibility for victim impact statements to be incorporated into the case record and considered by the judicial authority at the concluding, sentencing phase of the trial. However, in the majority of common law jurisdictions victims are not afforded the possibility to make sentencing recommendations.³⁴⁹

Although the submission of a victim impact statement is contingent on the will of the victim, whether this statement will subsequently be used by the relevant authorities depends entirely on the discretion of the latter. Further, victim impact statements do not represent evidentiary material unless they are adduced in accordance with the rules

³⁴⁴ *Ibid.*, Giannini, p. 446.

³⁴⁵ Victim impact statements have been introduced in Canada, USA, Australia, England and Wales. Victim impact statements are typically in a written form, though in Canada they could be read out loud by the victim in court. Through the victim impact statement the victims employ their right to say what they feel is important for the court to know. Victim impact statements reflect the impact of the crime on the victim and are taken into account at the sentencing stage by the court after a conviction has been pronounced and/or by the Prosecutor at the initial stages of the proceedings and may inform the latter's choice whether to proceed with the case or not. Victims in common law countries could also express views and concerns as regards specific matters, such as the release of the accused on parole, etc.

³⁴⁶ In the USA.

³⁴⁷ In the UK.

³⁴⁸ See Matti Joutsen, 'Listening to the Victim: the Victim's Role in European Criminal Justice Systems', *Wayne Law Review*, vol. 3-4 (1987-1988), pp. 95-124, p. 102.

³⁴⁹ The USA represent an exception. The UK and New Zealand expressly forbid this.

governing the submission of witness evidence.³⁵⁰ Consequently, victims do not have the right to actively impact of their own accord the evidence germane to the subject-matter of the case.³⁵¹

Thus, apart from the possibility to describe and reflect the effect of the crime in a victim impact statement, victims have limited say in the course of the proceedings. The victims' right to allocution is confined to the right to submit views and concerns on a limited number of specific issues, such as the interim release of the accused, parole conditions, licence conditions, cautioning, plea negotiations, etc. Hence, notwithstanding certain recent developments aimed at the enhancement of victims' service rights throughout the proceedings, common law jurisdictions afford a public platform to victims to share the impact of the crime upon them and voice concerns as regards matters which fall outside of the core of the subject-matter of the case at hand. That is to say, victims' views and concerns have no direct bearing on the judicial decision-making, including on the individual criminal responsibility of the alleged offender(s).

Unlike victims in the common law tradition, in continental systems, in addition to having an independent standing in their own right in proceedings, victims are vested with an array of participatory rights equating them, as a rule, to a party. Depending on the specificities of each particular system, victims are provided with the right to join pending criminal proceedings as an auxiliary/subsidiary accusers aimed at supplementing the public prosecution and/or assume the role of civil parties requesting reparations for the damages sustained. Accordingly, there are two main nuances within the continental model of victim participation: 1) participation for the purpose of contributing towards the ascertainment of the truth, irrespective of any claim for reparations 2) participation contingent on and for the purposes of bringing civil action in the criminal justice arena. These two nuances are not necessarily mutually exclusive, since some continental jurisdictions provide for combination of the two.³⁵² In addition, some jurisdictions also

³⁵⁰ In the UK, for instance, if the Prosecutor would take the view that the victim impact statement contains evidence to be lead at trial, he or she should inform the defence of the intention to lead that evidence before the trial takes place, including to disclose it in the manner provided for by law.

³⁵¹ See further on victim impact statements in the UK the Code of Practice for Victims of Crime (Victims' Code), published on 29 October 2013 and entered into force on 10 December 2013.

³⁵² E.g. Bulgaria, Germany (Nebenklage) and (Adhäsionsverfahren). However, those systems which follow the *partie civile* model of victim participation, such as France and the Netherlands, opt for the second nuance.

afford victims the right to initiate private prosecutions concerning offences against essentially private interests.³⁵³

In continental legal systems victims partake in criminal proceedings as of right, not upon a judicial assessment of whether the proceedings at hand affect their personal interests. The impact of proceedings on the victims' personal interests and, respectively, their right to intervene are recognized by virtue of the law. In addition, the participation of victims is not confined to any particular procedural phase. The standing of a party to the proceedings provides victims with full participatory rights throughout the entire criminal justice process. Victims are usually placed on an equal footing with the Prosecutor and the defence as regards the possibility to impact the fact-finding process and, respectively, the outcome of the case. On the whole, victims are afforded the opportunity to submit and examine evidence at trial, to oppose the collection of certain pieces of evidence, to request expert opinions.³⁵⁴

Hence, by contrast to victims in common law systems their counterparts in continental jurisdictions have the right to actively intervene on matters directly related to the fact-finding process, such as to adduce pieces of evidence or to request the collection of evidence on the subject-matter, including evidence concerning the individual criminal responsibility of the accused. Consequently, victim participation within the continental tradition has the potential to considerably impact both the conduct and the outcome of proceedings. Thus, victims may be regarded as full-fledged contributors to the proceedings and, accordingly, to decision-making in continental jurisdictions.³⁵⁵

Attributing the victims' participation model carved out by the ICC's founders to any specific pattern existing at the national level would prove unwarranted, not least because of the hybrid nature of the Court's legal framework. The ICC's procedural design is an adroit and innovative blend of the two main legal paradigms existing at the domestic plane, the 'melting pot' of some of the most adequate tendencies of criminal procedures stemming from all families of legal systems.³⁵⁶ As will be discussed shortly, the victims' participation scheme set forth in article 68(3) rather than being patterned exclusively

³⁵³ E.g. Belgium, Bulgaria, France, Germany, the Netherlands.

³⁵⁴ This observation is without prejudice to some specificities of certain jurisdictions, such as the Netherlands, where evidence is gathered upon the request of the victim by the Prosecutor.

³⁵⁵ Christodoulos Kaoutzanis, 'Two Birds with One Stone: How the Use of the Class Action Device for Victim Participation in the International Criminal Court Can Improve Both the Fight Against Impunity and Victim Participation', *University of California, Davis*, vol. 17:1 (2010), pp. 111-150, p. 114.

³⁵⁶ Donat-Cattin, *supra* note 13.

(predominantly) after the civil law or the common law tradition, embodies characteristics of various domestic jurisdictions fashioned according to the ICC's unique design and mandate.³⁵⁷ The Court's legal framework and its model of victims' participation illustrate an ingenious technique of espousing at the international horizon the universal ideas lying at the heart of criminal justice.³⁵⁸

The fact that article 68(3) represents an almost literal implementation of the right of victims pursuant to article 6(b) of the 'Victims' Magna Carta' is an eloquent sign of the endeavours of the Court's founders towards introducing victims of atrocity crimes as protagonists in their own right at the international criminal justice scene. At the same time, the perusal of article 68(3) attests to the understanding that this new international procedural phenomenon should not take place at all costs,³⁵⁹ that is to say, it should not thrive at the expense of other essential criminal justice objectives.

The ICC's drafting history suggests that the quest of the right balance between affording victims an independent standing in proceedings and other fundamental criminal justice objectives, such as fairness, due process and expeditiousness, proved a cumbersome undertaking. During the shaping of the statutory norm on victims' involvement in proceedings different emphasis was placed upon the inherent value of victims' participation and how far it should extend.³⁶⁰ The text of article 68(3) underwent numerous variations aimed at reconciling the conflicting views of the founders as regards the standing and the role of victims in the proceedings before the Court. The fact that the passage on victims' participation in the Draft ICC Statute was in square brackets implies

³⁵⁷ This fact is duly reflected in the jurisprudence of the Court, where it is acknowledged that the victims' participation scheme of article 68(3) 'has no immediate parallel or association with the participation of victims in criminal proceedings in either the common law system [...] or the Romano-Germanic system of justice'. See the elaborate analysis of article 68(3) in the Separate opinion of Judge Pikis to the Decision of the Appeals Chamber in the *Lubanga* case of 13 June 2007, paras. 8 *et seq.* See, in particular, para. 11.

³⁵⁸ See in this strain Schlesinger *et al.*, *supra* note 17, p. 42. Also, in the same fashion, the Judges of the ECCC have opined that combining at the international level the two main legal domestic systems is a part of a move towards a 'homogenous system' at the international level, adapting procedures from both common law and civil law traditions to ensure they fit the realities on the ground – see Kelsall *et al.*, *supra* note 281, p. 18. See also Cappelletti, *supra* note 277, p. 689, who rightly observes that '[w]hatever the oscillations and whims of a particular time and place, there are today basic developments and trends shared in common by all modern societies.'

³⁵⁹ See in the same vein, Spiga, *supra* note 10, p. 1384.

³⁶⁰ Emily Haslam, 'Victim participation at the International Criminal Court: a triumph of hope over experience?', *The Permanent International Criminal Court: legal and policy issues*, Dominic McGoldrick *et al.* (eds.), 2004, pp. 315-334, p. 325.

that the proper placement of victims in the ICC's procedural design was a controversial and contentious matter.³⁶¹

As a result, as article 68(3) now stands, it equilibrates restorative values incorporated through the participation of victims in their own right³⁶² with the core imperatives of modern criminal justice. Along with the recognition of the victims' right to take part in proceedings, this legal text articulates safeguards for due process, procedural fairness and efficiency. For the purpose of containing the genie in the bottle,³⁶³ the drafters have explicitly confined the participation of victims to instances where their intervention proves warranted (that is, when the victims' personal interests are affected) and is not prejudicial to or inconsistent with the rights of the accused, procedural fairness and impartiality.

Given the above it becomes evident that article 68(3) serves the attainment of a number of concurrent and equally important goals: 1) meeting the expectations of the international community aimed at affording victims a part on their own in international criminal proceedings; 2) safeguarding the expeditiousness and efficiency of proceedings by preventing the ICC's process from being flooded with myriad persons appearing before the Court and 3) ensuring the fairness of the process *vis-à-vis* the accused. The first objective is reflected in the wording 'shall permit', which, as noted earlier, entrusts an obligation upon the relevant Chamber to allow the participation of victims should the prerequisites for that arise. However, the Chamber is 'duty bound'³⁶⁴ to permit victims to have a say and to have their views and concerns considered by the decision-maker only in case of a positive determination as regards victims' personal interests and the

³⁶¹ See in the same vein Van Boven, *supra* note 114; William A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, Oxford Commentaries on International Law, Oxford University Press, 2010, pp. 832-833.

³⁶² Jo-Anne Wemmers, 'Where do They Belong? Giving Victims a Place in the Criminal Justice Process', *Criminal Law Forum*, vol. 20 (2009), pp. 395-416, p. 414, where it is observed that the criminal justice authorities could integrate restorative values in the proceedings. See also Brianne McGonigle, 'Bridging the Divides in International Criminal Proceedings: an Examination into the Victim Participation Endeavor of the International Criminal Court', *Florida Journal of International Law*, vol. 21 (2009), pp. 93-152, p. 102, where it is observed that 'participation of the victim in the process (whether legal or non-legal)' is among the key features of 'restorative justice'.

³⁶³ A periphrasis of the discussion suggested by Roland L. Warren, 'Model Cities First Round: Politics, Planning, and Participation', *Journal of the American Institute of Planners*, vol. 35:4 (1969), pp. 245-252, p. 245, concerning resident participation. With respect to the latter phenomenon the author observes that 'perhaps originally conceived as something which could be contained-like the genie in the bottle, [it] has somehow emerged and grown to impressive proportions [... as a] powerful new force on the urban scene'.

³⁶⁴ Separate opinion of Judge Georgios M. Pikis to the Decision of the Appeals Chamber of 13 June 2007, para. 15.

appropriateness of their intervention.³⁶⁵ The proviso conditioning the admission of victim-participants on the assessment as to whether their personal interests are affected and whether the intervention sought is appropriate embodies the two latter objectives pointed out above. First, the personal interests requirement incarnates the rationale that victims should be allowed to intervene only when their participation is justified, that is to say, when their personal interests are at stake. Secondly, even when the personal interests of victims are affected, their participation could still be denied if it is deemed inappropriate at that specific stage of proceedings or if the manner of the intervention sought would be inconsistent with the rights of the accused, fairness or expeditiousness of proceedings. Accordingly, when victims are admitted to intervene at a particular procedural stage and/or with respect to (an) issue(s) that has a bearing on their personal interests, still, their participation is not unlimited. The extent of the intervention of victim-participants is subject to the directions of the Chamber in charge of the proceedings aimed at ensuring that the manner of participation would not infringe the rights of the accused, procedural fairness and impartiality. Hence, as duly noted by commentators, victims before the ICC who participate at some stages of the proceedings may subsequently be ‘prohibited’ (more precisely, not allowed or not authorized) from participating in others.³⁶⁶

Commentators note that the Statute and the Rules say little as to how victim participation is to be put in practice,³⁶⁷ which leads some to conclude that article 68(3) is ‘frustratingly vague’³⁶⁸ and ‘affected by a fundamental lack of clarity’.³⁶⁹ However, the present author concurs with the understanding that broad, elastic formulations, as is the case with article 68(3), allow more flexibility in the interpretation of a given norm.³⁷⁰ This, on its part, provides better adaptability of both the wording and the spirit of the law to the circumstances and exigencies of each particular case. The language of article 68(3) clearly indicates the intentions of the drafters to that effect by enjoining the respective

³⁶⁵ See also *e.g.* Spiga, *supra* note 10, p. 1380, according to whom the Court is duty-bound to enable victims to participate in their own right when the conditions for participation are met.

³⁶⁶ Mohan, *supra* note 279, p. 745.

³⁶⁷ Jo-Anne Wemmers, ‘Victims and the International Criminal Court (ICC): Evaluating the Success of the ICC with Respect to Victims’, *International Review of Victimology*, vol. 16 (2009), pp. 211-227, p. 214.

³⁶⁸ Charles P. Trumbull IV, ‘Victims of Victim Participation in International Criminal Proceedings’, *Michigan Journal of International Law*, vol. 29 (2007-2008), pp. 777-825, p. 793, at footnote 116, according to which: ‘[o]ne commentator notes that much of the confusion relating to victim participation could be avoided “if the victim standing rule was not so vague.” Mugambi Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court*, 26 ST. Louis U. PuB. L. REv. 249, 269 (2007) [reference in the original].’

³⁶⁹ Zappalà, *supra* note 11, p. 149.

³⁷⁰ Schlesinger *et al.*, *supra* note 17, p. 263 *et seq.*

Chamber with the arduous task to give effect to the victims' participation regime in an ingenuous way in view of the specificities of the proceedings at hand.

In this respect, although on the surface the purpose of article 68(3) may not seem readily apparent,³⁷¹ the Court should construe the objective of this provision in light of the nature and the specificities of the ICC's procedural architecture, the overall spirit of the Court's constitutive instruments as well as the relevant rules which complement it. Indubitably, '[r]econciling the broad right of participation which article 68(3) creates and the right of the accused to have only one opponent is a difficult task.'³⁷² Still, some explicit guidance as to the manner and the extent of the involvement of victims pursuant to the general victims' participation scheme laid down in article 68(3) is provided by virtue of rules 89-91. The corresponding provisions in the Rules give an explicit formulation of the procedure to be followed by victim-applicants (rule 89) wishing to intervene in the criminal process and the conditions governing the legal representation of victim-participants in proceedings (rule 90). Through the introduction of the right of the legal representative to make observations and submissions (written and/or oral), to attend hearings and to question witnesses, experts and/or the accused upon an application to the Chamber, rule 91 illustrates, albeit non-exhaustively, certain forms (modalities) of victims' involvement in proceedings following an admission for participation by virtue of article 68(3). At this point it is worth recalling that the right to intervene in proceedings by way of questioning witnesses, experts and/or the accused pursuant to rule 91 is both vicarious and conditional. First, victims may avail themselves of the right to intervene in the examination of evidence solely through their legal representative. Secondly, the employment of this right is left to the assessment and ruling of the Chamber in light of the particular circumstances of the case. Thus, rule 91 further endorses the letter and the spirit of article 68(3) and rule 89(1) which leave to the Chamber in charge of the proceedings the determination of the appropriateness and the manner of the intervention of victim-participants against the backdrop of the interests at stake and the precepts of fairness, impartiality and expeditiousness.

This legislative approach and the whole rationale behind the victims' participation regime as set forth in the normative framework manifests that the ICC's criminal justice

³⁷¹ Haslam, *supra* note 360, p. 325.

³⁷² Cohen, *supra* note 22, p. 372.

process is not merely ‘a means to obtain fair outcomes’.³⁷³ The introduction of concurrent guarantees concerning the right of victims to partake in the proceedings, the fair trial rights of the parties, as well as expeditiousness ensure that the procedure itself is also fair. In this regard commentators aptly note that, albeit authorities working in the criminal justice system cannot guarantee favourable outcomes, they can (and must) guarantee fair procedures,³⁷⁴ that is, procedural justice.³⁷⁵

That said, as attested by the perusal of article 68(3) and its complementing rules, the victims’ participation scheme at the ICC adheres to the ‘common core of legal concepts and precepts shared by some or even most of the world’s legal systems’.³⁷⁶ While the role afforded to victims by virtue of article 68(3) goes beyond the position of the victim in common law systems, the place of victim-participants before the ICC falls short of the full-fledged standing of victims characteristic of continental jurisdictions. Whereas in common law jurisdictions the right of victims to have their voices heard is confined *ex lege* to particular instances and stages of the proceedings, the intervention of victims for the purpose of presenting their views and concerns pursuant to article 68(3) is not limited to a particular procedural stage or issue arising in the course of the criminal justice process. Furthermore, the presentation of victims’ views and concerns before the ICC is not restricted to any specific form or manner of presentation. Rather, the manner of presentation of victims’ views and concerns is left to the discretion of the Chamber in view of the specificities of the proceedings at hand. Hence, victims in common law jurisdictions play a more limited role in proceedings as compared to victims before the ICC.

The independent standing of victims in proceedings in their own right, separate and distinct from that of witnesses, is a common feature between the ICC’s and the continental model of victims’ involvement. The participation of victims pursuant to both models is not confined to any particular procedural stage. Nevertheless, by contrast to the automatic right of victims to participate in continental criminal proceedings, the possibility for

³⁷³ Wemmers, *supra* note 362, p. 215.

³⁷⁴ *Ibid.*

³⁷⁵ Procedural justice studies show that a fair procedure is appreciated regardless of its impact on the outcome – see in this regard Wemmers, *supra* note 362, p. 215, who also suggests that fair procedures ‘cushion’ negative outcomes, making them more palatable. In other words, ‘recent research indicates that those involved in criminal justice are ‘primarily concerned with the procedure by which the outcome was derived and not with the outcome itself’ – see McGonigle, *supra* note 362, p. 98.

³⁷⁶ Schlesinger *et al.*, *supra* note 17, p. 42.

victims to intervene in the ICC's process is not provided as of right, but is contingent on the requirements set out in article 68(3). Besides being conditional, the right of victims to partake in the ICC's proceedings is likewise limited to the presentation of victims' views and concerns and does not extend to the rights of the parties that are explicitly provided for by the legal framework. Hence, the present comparison warrants the conclusion that the ICC's participatory model does not extend to the full-fledged model of continental jurisdictions.

Contemplated from a broader perspective going beyond the criminal justice realm, the rationale behind the ICC's victims' participation regime appears to share common grounds with the ideas underpinning intervention of interested persons in ongoing litigation familiar to both common law and civil law jurisdictions.³⁷⁷ Pursuant to this participatory regime, the possibility for intervention is provided to persons who, despite not being a party to the action, have a personal stake in the outcome. The person whose interests are affected by the outcome of the case has a legitimate interest in intervening and is thus afforded the right to enter the litigation at hand.³⁷⁸

The similarities between the regime of victims' involvement set forth in article 68(3) and the precepts underlying intervention of interested persons are readily apparent. Akin to the prerequisite that the victims' personal interests must be affected by the ICC's proceedings in order to warrant intervention, the employment of the litigation rights of an intervenor is contingent on the assessment of the applicant's interest by the judicial authority in charge of the proceedings. That is, the decision-maker must take into consideration whether the prospective intervenor has a sufficient stake in the outcome of the case, the adequacy of representation of his or her legitimate interests and the prejudice, if any, to the parties if intervention is allowed. Furthermore, even when intervention is granted, the intervenor is not necessarily afforded all the rights of the parties at the trial or at the appellate levels.³⁷⁹ Following a case-by-case assessment by the respective judicial body, the intervenor may be accorded only few of the litigation rights of the parties. This approach is in tune with the principled understanding that 'it should not follow from the

³⁷⁷ See the elaborate study on intervention of interested persons suggested by David L. Shapiro, 'Some Thoughts on Intervention before Courts, Agencies, and Arbitrators', *Harvard Law Review*, vol. 81:4 (1968), pp. 721-772.

³⁷⁸ Further on the distinction between intervention as of right and permissive intervention, *i.e.* intervention subject to specific requirements, *see ibid.*

³⁷⁹ *Ibid.* The author correctly observes that even a person with the right to intervene may not have a right to appeal from an adverse decision on the merits.

right to intervene on a given issue that the intervener obtains all the rights [...] [accorded by the legal framework] with respect to every issue.’³⁸⁰ Along the same lines and equally true is the observation that ‘the interests of [...] [an intervener] may be adequately served, and his [or her] contribution ensured, by something less than full-scale participation at every stage.’³⁸¹

Still, unlike the intervention of victims before the ICC, the intervention in civil litigation is a once-and-for-all event. After the person is admitted as an intervener, he or she is accorded the rights of an intervener as provided for by the legal framework. Conversely, at the ICC, victims must demonstrate personal interest in issues arising in the course of the proceedings in order to justify their intervention with respect to an issue or a proceeding at stake.

The considerations developed hitherto warrant the conclusion that the participation of victims before the ICC echoes to a considerable extent the ideas underpinning the involvement of interested persons in an ongoing litigation. Consequently, the reference to victim-participants as ‘interveners’ into the ICC’s criminal justice process advanced in the legal literature does not seem fortuitous.³⁸²

Following the brief introduction suggested hitherto into the overall rationale of article 68(3) and the guiding principles on which the victims’ participation model is founded, careful consideration should in turn be given to each of the prerequisites of the involvement of victims as set out in the provision. The perusal of article 68(3) brings to the fore manifold issues, such as: the proper interpretation of the term ‘personal interests’; the interpretation of the term ‘proceedings’; whether the manner of victims’ participation should be pre-determined in a conclusive way at the outset of proceedings or the substance and the extent of the intervention should be evaluated on a case-by-case basis depending on the specificities of the issue(s) or the proceedings at hand; the exact substance and connotation of the term ‘views and concerns’, as well as how far victims may reach in the proceedings through the presentation of their views and concerns before the Court. The accurate answer to the questions raised above has a direct bearing on the proper functioning of the victims’ participation model carved out by the founders and, ultimately, on the efficient and timely conduct of the ICC’s process as a whole.

³⁸⁰ *Ibid.*, p. 754.

³⁸¹ *Ibid.*, p. 759.

³⁸² William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, 2nd edition, 2004, p. 173.

2. The ‘Personal Interests’ Requirement

The cornerstone of the intervention of victims in the ICC’s process by virtue of article 68(3) is the personal interests requirement. This proviso is the fundamental starting point for the admission of victim-participants in proceedings for the purpose of presenting their views and concerns. Said differently, the personal interests criterion is ‘the *conditio sine qua non* for the application of [...] article [68(3)]’.³⁸³

In fact, the existence of an interest, *i.e.* a personal stake in the proceedings, is a criterion that is equally crucial for any procedural intervention, irrespective of the character of the litigation at hand. As has been noted in the general context of intervention, the nature and the extent of the applicant’s interest in the proceedings lies ‘[a]t the heart of almost every intervention’.³⁸⁴ It thus follows that the requirement for a personal interest is amongst the most prominent ‘common strands in the area of intervention’³⁸⁵ whether in the context of adjudication before courts, agencies, and arbitrators³⁸⁶ or any other form of litigation.

At the ICC, the essential importance of the personal interests criterion has been acknowledged in the Court’s jurisprudence. Along the observation that the ‘status or identity of a person as a victim does not legitimize as such participation in any proceedings before the Court [...]’,³⁸⁷ it has been held that in order to ‘qualify for participation [...], the personal interests of a victim [...] must be affected.’³⁸⁸

In view of the considerations contemplated hitherto the personal interests proviso stands out as an essential feature distinguishing the status of a victim-participant from the status of a party at the ICC. The requirement for a personal interest in the proceedings denotes that victims, unlike the Prosecutor and the defence, cannot intervene automatically, as of right in the criminal justice process. Instead, victims can do so only as long as and to the extent to which they have a demonstrable personal stake in the proceedings at hand. Still, the constitutive instruments are silent as to what the requisite

³⁸³ Cohen, *supra* note 22, p. 368.

³⁸⁴ Shapiro, *supra* note 377, p. 729.

³⁸⁵ *Ibid.*, p. 740.

³⁸⁶ *Ibid.*

³⁸⁷ Separate opinion of Judge G.M. Pikiš to the Decision of the Appeals Chamber of 13 June 2007, para. 13.

³⁸⁸ *Ibid.*

personal stake in proceedings exactly signifies. Lacking an explicit definition in the ICC's constitutive instruments, the elucidation of the notion of 'personal interests' is thus left to the Chambers of the Court.

The accurate interpretation of the personal interests requirement is crucial for the proper operation of the general victims' participation scheme as intended and designed by the drafters. On the one hand, as noted in the legal literature, an overly strict interpretation of this criterion could potentially lead to denial of the victims' right to participate.³⁸⁹ However, it holds equally true that a rather elastic interpretation of the personal interests criterion would likewise occasion an alarming scenario whereby victims would be afforded an excessive intervention without any justification provided in the statutory framework. An unwarranted intervention, on its part, would put at risk the efficient and timely conduct of proceedings. Unduly delaying the proceedings could cause prejudice not only to the parties, but to the victims themselves and could, eventually, put their security at risk.³⁹⁰

Discerning the exact substance, scope and connotation of the personal interests requirement pursuant to article 68(3) has a direct bearing on the resolution of a variety of issues, such as: 1) the scope of victims who can take part in the proceedings at hand, that is, whether any victim of any crime falling within the ICC's jurisdiction has a 'personal interest' to intervene or only victims of those crimes that are the subject-matter of the respective proceedings; 2) whether the general interest of victims in the dispense of justice qualifies as a 'personal interest' within the meaning of article 68(3) sufficient to warrant intervention with respect to (a) particular issue(s) arising in the course of the proceedings; 3) whether the impact of the proceedings on the victims' personal interests (according to the phrase 'where the personal interests of victims are affected') is to be (pre)determined in the abstract and in a uniform manner or should be assessed on a case-by-case basis in light of the circumstances of the case at hand.

In order to unravel the proper connotation of the personal interests criterion, this requirement should not be construed in isolation on its own. Read in the context of the procedural architecture, the overall rationale and guiding principles permeating the ICC's process, the personal interests criterion reveals itself as being two-fold (two-pronged).

³⁸⁹ Cohen, *supra* note 22, p. 368

³⁹⁰ Jérôme de Hemptinne, 'Challenges Raised by Victims' Participation in the Proceedings of the Special Tribunal for Lebanon', *Journal of International Criminal Justice*, vol. 8:1 (2010), pp. 165-179, p. 167.

Within the purview of the notion ‘personal interests’ pursuant to article 68(3) concurrently belong: 1) the personal interests of victims that warrant their admission as participants in proceedings for the purpose of expressing views and concerns and 2) the personal interests of victim-participants that justify specific intervention with respect to a particular proceeding or issue arising in the course of the ongoing process. Consequently, this requirement of article 68(3) encompasses, first, the personal interests of victims warranting access to the proceedings at hand and, secondly, the personal interests of victims warranting intervention in a particular proceeding or issue subsequent to their admission as participants.

2.1. Personal Interests of Victims Warranting Access to the Proceedings at Hand

The first prong of the requirement for a personal interest differentiates victims who are linked to the subject-matter of the case under consideration from victims who are extraneous to the proceedings at hand. That is to say, the personal interests criterion distinguishes victims who are entitled to access a given criminal justice process from victims who do not fall within the purview of article 68(3) with respect to the current proceedings. Only victims with a personal stake in the respective proceedings would, accordingly, be entitled to apply for intervention with the prospects of being admitted to participate. It thus follows that the first prong of the personal interests proviso comprises the personal link of a victim with the subject-matter of a given criminal justice process.

Hence, the personal interests criterion delineates the scope of potential victim-participants pursuant to article 68(3) in the context of a particular criminal justice process taking place at the ICC. Consequently, as rightly noted in literature, the personal interests requirement entails that article 68(3) is addressed specifically to victims of a given crime.³⁹¹ Accordingly, the personal interests criterion is intrinsically linked to the state of victimhood. Therefore, it is to be concluded that the legitimate interest of victims, *i.e.* ‘an interest of a legal nature’,³⁹² that justifies their intervention in the proceedings emanates from the harm suffered as a result of the criminal conduct under consideration.³⁹³

³⁹¹ *Ibid.*

³⁹² See article 62 of the Statute of the International Court of Justice. Conversely, non-legitimate, thus irrelevant, are, for instance, the political interests of victims. See in this respect the findings of the Pre-Trial Judge at the

This aspect of the personal interests proviso relating victims to the subject-matter of the proceedings at hand echoes the requirement for a causal link between the alleged harm and the crime under consideration pursuant to the victims' eligibility provision of rule 85 introduced subsequent to the adoption of the Rome Statute. Both the personal interests and the causal nexus criteria are shaped upon the common tenet that only victims linked to the subject-matter of the proceedings at hand may intervene by virtue of article 68(3). In other words, only victims who have suffered harm as a result of the crime(s) under examination have a personal stake in the respective proceedings, in their development and, eventually, in their outcome.

In addition, before proceeding with the second prong of the personal interests criterion it is to be noted that the notion 'personal' goes beyond the interest of the wider public and of the international community as a whole in bringing to book the perpetrators of egregious crimes falling within the Court's jurisdiction. The term 'personal' implies an individual (private) rather than a public (communal) interest. That is to say, the wording 'personal' implies concreteness rather than generality. Consequently, 'personal' entails more than a general interest in the outcome of the case. In fact, this observation is equally applicable to intervention in any litigation. In this regard as early as the 1960s it has been acknowledged that a prospective intervener 'must have more of a stake in the proceeding than simply a concern with the general precedent value of the decision'.³⁹⁴ The interest of the intervener must be concrete and directly related to the subject-matter of the proceedings at hand.³⁹⁵

2.2. Personal Interests of Victims Warranting Intervention in a Particular Proceeding Subsequent to Their Admission as Participants

While the first prong of the personal interests requirement relates to the question of whether a victim has a personal stake in the outcome of the proceedings at hand and,

STL in the *Ayyash et al.* case in the Decision on Victims' Participation in the Proceedings, 8 May 2012, para. 124. The Pre-Trial Judge has considered that the political interests of victims, if any, should not influence the decision on whether the victim-participants should be divided into groups (in view of the fact that some victims had expressed the desire not to be associated with the political interests of certain other victims).

³⁹³ Donat-Cattin, *supra* note 13, p. 1286.

³⁹⁴ Shapiro, *supra* note 377, p. 729.

³⁹⁵ See in the same vein, *Haya de la Torre case*, Judgment of 13 of June 1951, I.C. J. Reports 1951, p. 9 with respect to the intervention sought by Cuba.

respectively, in the criminal justice process as a whole, the second prong of the criterion relates to the question whether a victim-participant has a personal interest in engaging in specific matters emerging throughout the proceedings. Accordingly, the fact that a victim has a personal interest in a particular criminal justice process as a whole does not automatically entail that the victim will necessarily have a personal stake in any procedure or issue arising in the course of the proceedings. Said differently, the second prong of the personal interests requirement identifies amongst the victims admitted to participate pursuant to article 68(3) those victim-participants who may intervene with respect to a particular proceeding or issue(s). Hence, the second prong of the personal interests criterion serves the purpose of determining whether victims admitted for participation will be allowed to present views and concerns on a separate proceeding or issue. This second prong of the personal interests proviso thus refers to the specific personal interests of victim-participants. Therefore, the personal interests comprised by the second prong of this criterion are, by implication, context-specific. Given the above it becomes apparent that the specific personal interests come into play once a person is admitted as a victim-participant before the ICC following a positive determination of his or her victim status with respect to the proceedings at hand. These interests legitimize the intervention of victims at particular stages of proceedings.

2.3. Reflections in the Literature and in the Jurisprudence

In light of the considerations advanced hitherto, the view of some commentators that the personal interests requirement is superfluous, since it should be automatically met once a person is granted victim status,³⁹⁶ proves untenable. The recognition of a person as a victim and consequently his or her admission as a participant in proceedings represents an acknowledgement of, *inter alia*, the causal nexus between the harm allegedly sustained by the victim and the crimes under consideration, that is, an acknowledgement of the personal stake of the victim in the proceedings. As noted earlier, the personal interests of victims in a given criminal justice process bear a different connotation from the general interest of the international community in justice being meted out. At the same time, admission in proceedings does not entail that each victim-participant would be able to

³⁹⁶ De Hemptinne, *supra* note 390, p. 168.

intervene automatically, as of right and/or indiscriminately with respect to any matter that arises in the course of the proceedings. Whether a victim-participant has a personal stake in issues surfacing in the course of the proceedings is a different question that must be determined on a case-by-case basis.

The jurisprudence of the Court also reflects the complexity of the notion of ‘personal interests’. Initially TC I favoured a rather flexible interpretation of the personal interests criterion neglecting altogether the requisite personal link between the victim and the crime under examination. The Chamber has held that potentially any victim of any crime falling within the ICC’s jurisdiction could be entitled to partake in proceedings before the Court, regardless of whether the alleged harm sustained by the victims ensued from the circumstances of the case at hand.³⁹⁷ This view has expanded the notion ‘personal interests’ of article 68(3) so as to comprise the general interest of any victim with respect to any criminal proceeding, manifested, *inter alia*, in the interest in the determination of the truth and the punishment of the perpetrator(s).³⁹⁸ Such a broad interpretation of the notion ‘personal interests’ fails to take into account the fact that victims allegedly harmed by a behaviour falling outside the subject-matter of the case under consideration do not have a personal stake in the proceedings at hand. Consequently, they do not have a personal interest to intervene pursuant to article 68(3).

Conversely, in tune with the rationale behind the personal interests criterion the Appeals Chamber has discerned the necessity for a personal stake in the extant proceedings. The Chamber held that only victims of the crimes charged will be able to demonstrate that the trial affects their personal interests.³⁹⁹ As eloquently noted in a separate opinion to the Appeals Chamber Judgment, ‘the personal interests [of victims] to the extent they are affected by the proceedings’ are ‘the cause that legitimizes their [*i.e.* the victims’] participation, the cause that distinguishes them from other victims’.⁴⁰⁰ Further, in the same vein in addressing the question ‘[o]f which victims (of those coming within the [rule 85] definition) the personal interests are at stake in any given

³⁹⁷ *Lubanga*, TC I, 18 January 2008. The Chamber, by majority, ruled, on the one hand, that ‘a victim of any crime falling within the jurisdiction of the Court can potentially participate’. On the other hand, the Chamber noted that ‘it would not be meaningful or in the interests of justice for all such victims to be permitted to participate’ because the evidence and issues for examination will be ‘wholly unrelated’ to the crimes that caused harm to such victims.

³⁹⁸ The victims’ interest in the establishment of the truth consists of seeing punishment not against the accused, that is, punishment at any cost, but only against the guilty person – see Donat-Cattin, *supra* note 13, p. 1283.

³⁹⁹ *Lubanga*, Appeals Chamber Judgment of 11 July 2008, para. 62.

⁴⁰⁰ Separate opinion of Judge G.M. Pikis to the Decision of the Appeals Chamber of 13 June 2007, para. 20.

proceedings’⁴⁰¹ it has been noted that these are the personal interests of ‘victims who suffered harm from the crime or crimes, the subject-matter of’⁴⁰² the proceedings at hand. The logical conclusion has thus been advanced that article 68(3) confers ‘upon a specified class of victims a right to participate, in the circumstances envisaged therein, in proceedings before the Court.’⁴⁰³

With respect to the intervention of victim-participants on a particular issue or proceeding emerging throughout the criminal process, the Appeals Chamber has endorsed the understanding that the victims’ right to take part in proceedings on interlocutory appeals is not automatic.⁴⁰⁴ Thus, with respect to the context-specific interests which would warrant intervention with regard to a particular proceeding or matter at stake, applicants have been requested to demonstrate how their personal interests are affected by the issue certified for appeal.⁴⁰⁵ That is to say, the victims applying for intervention must be related to the *sub judice* decision in order for their interests to be affected by the issue and/or proceedings at stake (*i.e.* by the issue on appeal and/or by the appeals proceedings).⁴⁰⁶ For instance, in the *Situation in Uganda*, where the subject-matter of the interlocutory appeals proceedings was mental harm and its determination, the Appeals Chamber quite reasonably found that this issue did not fall within the scope of the personal interests of a victim-participant whose status as a victim and, accordingly, right to participate were based solely on an alleged physical harm.⁴⁰⁷

3. ‘Are Affected’

Following the examination of the purview of the notion ‘personal interests’ as enunciated in article 68(3), attention should be drawn to the expression ‘where the personal interests of victims are affected’. The review of the relevant jurisprudence shows that the language ‘are affected’ is likewise susceptible to two opposing interpretations: 1) the personal

⁴⁰¹ *Ibid.*, para. 13.

⁴⁰² *Ibid.*

⁴⁰³ *Ibid.*, para. 10.

⁴⁰⁴ *Kony et al.*, Appeals Chamber, Decision on the participation of victims in the appeal, ICC-02/04-01/05-324, 27 October 2008, para. 8.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ Dissenting opinion of Judge Georgios M. Pikis to the Decision of the Appeals Chamber of 27 October 2008, ICC-02/04-01/05-324, para. 16.

⁴⁰⁷ *Situation in Uganda*, Appeals Chamber, Decision on the Participation of Victims in the Appeal, ICC-02/04-164, 27 October 2008, para. 11 *et seq.*

interests being affected as a whole and in general by the very fact of the proceedings taking place or, conversely 2) the personal interests being affected by a particular proceeding or issue, depending on the circumstances.

3.1. 'Systematic' Interpretation

According to the first view, the personal interests of victims are perceived as being affected as a matter of principle by the very fact of a given criminal justice process. Thus, this approach regards the personal interests of victims as being always and in general affected by the ongoing proceedings. As a result, pursuant to this view, the intervention of victims is at all times warranted. This standpoint proves unsustainable for the following reasons. First, the general interest of victims in the establishment of the truth and in the punishment of the perpetrator(s) has been taken into account by the Court's founders during the drafting of the constitutive instruments and is, accordingly, reflected in the very possibility of victims to have an independent standing in their own right in the ICC's proceedings. The enunciation of the right of victims to appear before the ICC in a capacity different than witnesses is an endorsement in itself of the overarching interest of victims to know the truth and to have their voices heard. Secondly, the approach just discussed renders devoid of substance the explicit requirement of article 68(3) for an assessment on the part of the Chamber of whether the intervention sought is warranted and appropriate in light of the circumstances at hand.

The 'systematic approach' advanced in the initial jurisprudence of PTC I is an emanation of the understanding discussed above. In the context of the investigation stage of the proceedings in the *Situation in the Democratic Republic of Congo* the Chamber perceived the personal interests of victims as being in general affected by the proceedings at hand, since the victims' participation at this procedural stage could serve 'to clarify the facts, to punish the perpetrators and to request reparations'.⁴⁰⁸ The Chamber observed that 'the personal interest of the victims flows from (i) the desire to have a declaration of truth by a competent body (right to truth); (ii) their wish to have those who victimized them

⁴⁰⁸ *Situation in DRC*, PTC I, 17 January 2006, para. 63

identified and prosecuted (right to justice) and (iii) the right to reparation.’⁴⁰⁹ As discussed in the preceding paragraph, such a ‘generous access of victims to the proceedings’⁴¹⁰ runs afoul of both the wording and the spirit of article 68(3). It is worth reiterating that if the drafters had in mind the systematic approach, favoured by PTC I, the Court’s founders would have themselves predetermined the right of victims to intervene automatically and autonomously without prior judicial determination, as is the case with participation in proceedings of limited object and purpose pursuant to articles 15 and 19.

3.2. Case-Specific Interpretation

Pursuant to the alternative view, the assessment of whether the personal interests of victims are affected is case-specific. This view favours a casuistic interpretation of the wording ‘where the personal interests of victims are affected’. This understanding is in tune with the very language of the provision, in particular, the usage of the conjugation of the verb ‘to be’ in its present tense - ‘are’ affected – and not in the conditional tense - ‘may be’ affected. Hence, in order to warrant intervention with respect to a specific issue and/or proceeding, the personal interests of victims must be actually affected rather than merely potentially, hypothetically or generally affected by the proceedings at hand. This understanding is not only in line with the overall spirit of article 68(3), but also chimes to a great extent with the overarching precepts governing intervention by interested persons in general. As previously observed, a person wishing to intervene must have more of a stake in the proceeding than simply a concern with the general precedent value of the decision.⁴¹¹ The determination of an interest, as well as whether this interest is affected by the ongoing proceedings necessarily involves an exercise of discretion (and, accordingly, a case-by-case determination) rather than the application of a mechanical formula.⁴¹² In practice, observations in the same vein have been advanced, for instance, by the Prosecutor, who has contended that the personal interests requirement must be interpreted more concretely than the general interest of any victim in the progress and the outcome of

⁴⁰⁹ *Katanga and Ngudjolo*, PTC I, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, 13 May 2008 (*Katanga and Ngudjolo*, PTC I, 13 May 2008), paras 31-44.

⁴¹⁰ Schabas, *supra* note 361, p. 827.

⁴¹¹ See Shapiro, *supra* note 377.

⁴¹² *Ibid.*, p. 758.

the process. Further, the Prosecutor has averred that victims wishing to intervene should be required to show that ‘judicially recognizable personal interests’ are affected by the proceedings in which they apply for participation.⁴¹³

The above considerations lend support to the conclusion that the expression ‘where the personal interests are affected’ reflects the endeavours of the drafters to afford victims the possibility to engage with an issue or in a given proceeding that has a bearing on their personal interests and to prevent, accordingly, an unwarranted intervention with respect to an issue or a proceeding that has no effect on the victims’ personal interests. This approach is consistent with the fundamental legal principle that involvement in any proceeding is warranted only when the intervener can demonstrate a concrete, personal interest in the matter at issue. In addition, it serves to ensure that the intervention of victims rather than being an end in itself that would eventually disrupt the proceedings, should adhere to the overarching interests of justice in general.

Consequently, the question whether the personal interests of victims are affected in the course of the proceedings in a way that would warrant intervention is a matter that must be contemplated in light of the specificities of the proceedings at hand. Neither could the particular personal interests of victims in the ongoing proceedings be encompassed by a single definition, nor could the instances which may affect them be predetermined in advance of the actual proceedings. It could not be predetermined beforehand and in the abstract how, when and to what extent an issue or a proceeding at hand would in reality affect the personal interest of victims in the course of the proceedings. Furthermore, as practice shows, the one and the same matter may affect the personal interests of certain participating victims, whereas it may have no bearing on the personal interests of other victims. At this point, the scenario that unfolded before the Appeals Chamber in the *Kony et al.* case is worth recalling. The Chamber found that the subject of the interlocutory appeal had a direct bearing on the personal interests of a certain group of victims, namely of those victims whose victim status was at issue in the *sub judice* decision. At the same time, the interlocutory appeal did not affect the personal interests of the rest of the victim-participants whose victim status was not at issue. In fact, akin to the ICC (except for the initial case-law of PTC I, which was subsequently discarded) the STL as well favours the casuistic interpretation of the expression ‘are affected’. In the same fashion, the Pre-Trial

⁴¹³ *Lubanga*, Prosecutor’s Reply to Applications, ICC-01/04-346, 25 June 2007, para. 19.

Judge in proceedings at the STL has held that in order for victims ‘to participate in proceedings [...] in relation to a specific issue, a VPP’s [victim-participant’s] personal interests must be affected by the particular issue under consideration [footnote omitted].’⁴¹⁴ Accordingly, it has been held that ‘[w]here the VPPs’ [victim-participants’] personal interests are not affected by the particular issue at a specific stage in the proceedings in which they seek to intervene, their participation will either be limited or prevented accordingly [footnote omitted].’⁴¹⁵ In the same vein, the Pre-Trial Judge found that whenever the law requires authorization by the Chamber, it creates ‘an ongoing review regime’ with respect to the victims’ entitlement to perform a procedural act.⁴¹⁶ That is to say, victims’ participation is not a once-and-for-all event.⁴¹⁷

4. Appropriateness

The impact on the victims’ personal interests of an issue or an incidental proceeding does not *per se* justify the participation of victims at any particular stage of the process. Once the Chamber has ascertained that the personal interests of victims are affected, by virtue of article 68(3) it shall determine whether the participation of those victims is appropriate at the stage of the proceedings at which intervention is sought.

Article 68(3) entrusts the respective Chamber with the authority to determine the appropriateness of the victims’ intervention both as regards the proceedings and the manner in which it should take place. Hence, the appropriateness requirement set forth in article 68(3) may be portrayed as two-pronged. The first prong of this criterion relates to the procedural stage at which the intervention is sought. The second prong relates to the appropriateness of the intervention itself, including the manner in which it is to take place, which, as a matter of principle, must not be prejudicial to or inconsistent with the rights of the accused, fairness and impartiality of proceedings.⁴¹⁸ The appropriateness requirement with its two components is further endorsed through the stipulation of rule 89(1), which

⁴¹⁴ Ayyash *et al.*, Decision of the Pre-Trial Judge of 18 May 2012, para. 18.

⁴¹⁵ *Ibid.*

⁴¹⁶ *Ibid.*, para. 51.

⁴¹⁷ Lubanga, TC I, 18 January 2008, para. 101.

⁴¹⁸ As noted in *Bemba*, by PTC II, in the Decision of 22 April 2009: ‘Even when the personal interests of victims are affected within the meaning of article 68 (3) of the Statute, the Court is still required, by the express terms of that article, to determine that it is appropriate for their views and concerns to be presented at that stage of the proceedings and to ensure that any participation occurs in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.’

enjoins the Chamber with the discretion to determine the proceedings and the manner in which participation is deemed appropriate. Consequently, by virtue of article 68(3) and the complementing provision of rule 89(1), the determination of the appropriate proceedings and the manner of victims' intervention are left to the discretion of the Chamber in charge of the proceedings.

The appropriateness both of the proceedings and of the intervention sought should be evaluated in light of the purpose of the proceedings in question,⁴¹⁹ as well as in light of the precepts of a fair and impartial trial and the rights of the accused.⁴²⁰ If the solicited intervention goes beyond or is unrelated to the scope and the purpose of the proceedings at hand, the participation of victims would not be appropriate.

4.1. Appropriate Stages of the Proceedings

The first prong of the appropriateness requirement prompts the issue concerning the scope of the term 'proceedings' within the ambit of article 68(3). In view of the multi-layered architecture of the ICC's process, the question arises as to whether participation in proceedings pursuant to article 68(3) relates to proceedings taking place before a Chamber, *i.e.* judicial proceedings, or should be construed broadly as encompassing also the initial stage of the process, that is, the investigation of a situation.

In order to properly discern the compass of the notion 'proceedings' as enunciated in article 68(3) one should take heed of the intentions of the drafters as regards the confines of victims' involvement in the ICC's process, as previously discussed. The exact substance of the wording 'proceedings' should also be construed in light of the stipulation which entrusts explicitly and exclusively the Chamber with the authority to determine the appropriateness of victims' intervention. Notably, the Prosecutor does not fall within the purview of article 68(3). If the drafters had intended the principled possibility for victims to participate at the investigation stage, the Prosecutor as the ICC's organ in charge of the investigation of a situation would have been vested with a similar discretion to assess the appropriateness of the victims' intervention at this initial stage of the criminal process. Logic, therefore, dictates that the investigation of a situation as a whole is not comprised

⁴¹⁹ *Ruto et al.*, PTC II, Decision on the Motion by Legal Representative of Victim Applicants to Participate in Initial Appearance Proceedings, ICC-01/09-01/11-14, 30 March 2011, para. 6.

⁴²⁰ Separate opinion of Judge G.M. Pikis to the Decision of the Appeals Chamber of 13 June 2007.

by article 68(3). Accordingly, the investigation of a situation does not represent ‘proceedings’ within the scope of the fundamental provision on victims’ participation.

At this point, however, the following clarification proves essential. During an investigation specific instances and/or incidental proceedings may occur that fall within the primary authority of the Chamber, such as the scenario delineating a unique investigative opportunity pursuant to article 56 or other functions of the Pre-Trial Chamber in the course of an investigation, as enunciated in article 57. In other words, whenever a specific instance or incidental proceeding arising in the course of the investigation would necessitate judicial determination, such instances would be comprised by the term ‘proceedings’ of article 68(3) due to the primary authority of the Chamber in their resolution.

Although at present the same logic transpires from the case-law of all of the ICC Chambers, a view in the opposite strain has been espoused by PTC I in its initial jurisprudence. The Chamber has held that the expression ‘stages of the proceedings’ comprises the situation stage as a whole, including the investigation of a situation. According to these findings, the investigation of a situation and the pre-trial phase of the case are appropriate stages of the proceedings for victim participation under article 68(3). On the basis of a number of terminological, contextual and teleological arguments the Chamber reached the conclusion that the term ‘proceedings’ does not necessarily exclude the investigation of a situation and thus interpreted this notion as including the stage of investigation of a situation. Along these lines, the Chamber concluded that victims have ‘a general right of access to the Court at [the investigation] stage.’⁴²¹ This ruling led the Chamber to accord the so called ‘procedural status of victim’ to the successful applicants at the investigation stage as a whole, outside the context of (a) specific proceeding(s).

It comes as no surprise that this understanding remained isolated and was eventually reversed by the Appeals Chamber which opined that the investigation as such does not constitute a stage of the proceedings in the meaning of article 68(3). The Chamber made the apposite distinction between the procedural nature of an investigation and of a judicial proceeding, by noting that an investigation represents ‘an inquiry conducted by the Prosecutor into the commission of a crime.’⁴²² For the purpose of article 68(3) the Appeals Chamber found that the term ‘proceedings’ denotes a ‘judicial cause

⁴²¹ *Lubanga*, PTC I, 17 January 2006, para. 45.

⁴²² *Situation in the DRC*, Appeals Chamber Decision of 19 December 2008, para. 45.

pending before a Chamber', since the word 'procedural' indicates something pertaining to procedure. The Chamber embraced the correct stance that victims are not deprived from the possibility to intervene at the investigation stage of proceedings altogether, as long as there are judicial proceedings taking place at the investigation stage (that is, proceedings of which the Chamber is in charge, not the Prosecutor). As a result, the understanding was advanced that the victims' right to participate does not encompass the Prosecutor's investigation of a situation, except for particular judicial proceedings affecting investigations to the extent that the victims' interests are affected.⁴²³

Similarly, PTC II has sketched in a succinct, but eloquent way, the different scenarios within the context of an investigation constituting an issue leading to judicial determination which may be deemed appropriate for victims' participation. Such scenarios, as the Chamber found, are outlined in articles 53, 56(3) and 57(3), other instances under rule 93 and also other instances which may arise where victim participation may be deemed appropriate following a case-by-case determination of whether their personal interests are affected and the intervention proves in fact appropriate. This judicial finding is a further indication of the fact that the issues which may arise in the course of the proceedings can only be presumed to a certain extent, but cannot be predetermined exhaustively in advance. Equally worth noting is the opposite scenario contemplated by the Chamber, whereby a judicial proceeding would not require judicial determination, thus, would not be deemed appropriate for victims to intervene - the initial proceedings before the Court pursuant to article 60. These proceedings serve a limited purpose as set out in article 60(1) and, therefore, quite logically, have no bearing on the personal interests of victims.

In view of the above it becomes evident that, except for the initial stage of the criminal process, *i.e.* the investigation stage as a whole, article 68(3) encompasses a broad spectrum of proceedings (and stages of proceedings) that may be deemed appropriate by

⁴²³ *Ibid.* This view is embraced at present by PTC I, which has revised its initial view as regards the compass of the term 'proceedings' and has, accordingly, embraced a completely new approach with respect to new applications. *See e.g. Situation in DRC*, PTC I, Decision on victims' participation in proceedings relating to the situation in the Democratic Republic of the Congo, ICC-01/04-593, 11 April 2011, where the Chamber identified the judicial proceedings in which victim participation could take place. It held as well that the granted 'procedural status' can no longer be sustained in the form envisaged before, denouncing the existence of a general right to participate to victims. Similarly, in *Banda and Jerbo*, Decision on Victims' Participation at the Hearing on the Confirmation of the Charges, ICC-02/05-03/09-89, 29 October 2010, para. 60 *et seq.*, the Chamber enumerated the rights of victims to be employed *via* their legal representatives during and prior to the confirmation of charges hearing, as envisaged in the legal framework, but stated that it would decide on a case-by-case basis whether to grant specific possibility or not.

the Chamber in charge for victims to intervene, following a case-by-case assessment of the impact on the victims' personal interests. In this regard, comparatively speaking, an essential distinguishing feature between the ICC and the STL comes into sight. By contrast to the ICC, the procedural stages at which victim-participants at the STL may intervene are more limited by virtue of the legal framework. Although article 17 of the STL's Statute is almost a literal duplicate of article 68(3), according to the explicit stipulation of rule 86(A) of STL's Rules of Procedure and Evidence, participation pursuant to article 17 may only take place subsequent to the confirmation of the indictment by the Pre-Trial Judge under rule 68 of STL's Rules of Procedure and Evidence.⁴²⁴ Hence, victims at the STL are not entitled to participation in proceedings leading up to the confirmation of the indictment, unlike their counterparts at the ICC. The latter have the possibility to intervene, subject to the requirements of article 68(3), in the confirmation of charges proceedings pursuant to article 61 and even in incidental judicial proceedings during the investigation stage (such as under article 56, 57, as previously mentioned). Accordingly, at the STL, procedural stages preceding the confirmation of the indictment by the Pre-Trial Judge are deemed not to be appropriate by virtue of law.

4.2. Appropriateness of the Intervention

Next to be noticed is that even when a stage of the proceedings is deemed appropriate for the participation of victims, the requested intervention must in itself also be appropriate. Therefore, the appropriateness of the intervention as such is necessarily case-dependent rather than purely hypothetical. Notably, the same logic imbues also the relevant jurisprudence. For instance, as regards the request of victims to submit *amicus curiae* in the pre-trial proceedings in the *Bemba* case, the Court has found that such an intervention on the part of victims was not appropriate, notwithstanding the fact that by virtue of rule 103(2) victims may respond to *amicus curiae* observations upon the discretion of the Chamber. The Court reached its reasoning heedful of the fact that victims had already submitted observations with regard to the same issue subject of the *amicus curiae*

⁴²⁴ Rule 86(A) of STL's Rules of Procedure and Evidence reads as follows: 'If the Pre-Trial Judge has confirmed the indictment under Rule 68, a person claiming to be a victim of a crime within the Tribunal's jurisdiction may request the Pre-Trial Judge to be granted the status of victim participating in the proceedings pursuant to Article 17 of the Statute.'

observations.⁴²⁵ By contrast, the intervention of victims was deemed appropriate in an interlocutory appeal in the *Lubanga* case concerning the Trial Chamber's decision to stay the proceedings. The Court held that the issue under consideration impacts the victims' ability to present their views and concerns and could ultimately preclude them from the opportunity to claim reparations, should the accused not be convicted.⁴²⁶

5. Modalities of Participation

Subsequent to the examination of the personal interests and the appropriateness requirements of article 68(3), next to be contemplated is the way in which the Chamber in charge of the proceedings should specify the manner and the extent of the participation of victims. The review of the Court's jurisprudence prompts the question whether the judicial determination of the manner in which intervention is deemed appropriate should be pre-determined at the outset, in the abstract and in a uniform way or should be assessed and specified in light of the circumstances of the particular case pending before the Chamber.

Save for the few illustrations in the Rules of the manner in which victims may intervene, for instance, in the examination of evidence, as set forth in rule 89 and 91, the legal framework does not contain any exhaustive stipulation regarding the appropriate proceedings or the manner of participation of victims pursuant to the general victims' participation scheme. This is an eloquent indication of the fact that instead of confining the mode and the extent of the victims' participation to a specific pattern, the normative basis allows judicial flexibility in the determination of victims' involvement in proceedings which is to be fashioned to the circumstances of each particular case.⁴²⁷ Judicial ingenuity, however, should adhere to the spirit and the rationale lying at the heart of the normative basis. Otherwise, if it would go beyond the framework laid down by the

⁴²⁵ *Bemba*, PTC II, Decision of 22 April 2009.

⁴²⁶ *Lubanga*, Appeals Chamber, Decision on the Participation of Victims in the Appeal against Trial Chamber I's Decision to Stay the Proceedings, ICC-01/04-01/06-2556, 18 August 2010.

⁴²⁷ See in the same vein, *Katanga and Ngudjolo*, TC II, 22 January 2010. See also the Independent Panel of Experts Report on Victim Participation at the International Criminal Court (based on the Panel's meeting and consultations held in The Hague on 24-27 April 2013), p. 12, according to which '[a]n issue primarily for the Judges who ultimately decide is the way victims participate in proceedings.'

law-makers, judicial creativity would occasion ‘a wholesale departure from the intention of the drafters’.⁴²⁸

5.1. Uniform Pre-determination of Modalities of Participation

Given the importance of a case-by-case determination of the impact of the proceedings on the victims’ personal interests, as well as of the appropriateness of the intervention sought, a predetermination of the manner of participation of victims in a given proceeding would seem contrary to the design and the rationale behind victims’ participation at the ICC. Nevertheless, the uniform predetermination of the manner of victims’ involvement has been favoured initially by Pre-Trial Chamber I. The Chamber construed the will of the drafters as enjoining the relevant Chamber with the authority to enunciate beforehand and as a matter of principle the mode and the extent of victims’ participation by way of exhaustive sets of rights equally applicable to all victim-participants in the proceedings of the case at hand.⁴²⁹ This line of reasoning has been termed by the Chamber as a ‘systematic approach’ as regards the manner of victims’ involvement in proceedings, whereby the set of procedural rights which participating victims may exercise is clearly determined. In other words, the manner of participation is a once-and-for-all event and, as such, is not subject to any further consideration throughout the proceedings.⁴³⁰ On the basis of an extensive study of national jurisdictions pertaining to the two prevailing traditions, the Pre-Trial Chamber elaborated categories of rights to which victims would, as a matter of principle, be entitled in the course of the pre-trial stage of the case. PTC I observed that the rights accorded to victims in domestic criminal proceedings are neither *per se* prejudicial nor inconsistent with the rights of the accused, nor to fairness and impartiality of proceedings.⁴³¹ As a result, taking heed of the main features of the ICC’s pre-trial proceedings and the object and purpose of the relevant provisions, the Chamber made a general and a conclusive predetermination of the set of procedural rights which are

⁴²⁸ See para. 11 of the Joint Separate opinion in *Ruto and Sang* case to the Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial” Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial”, ICC-01/09-01/11-1066, 25 October 2013.

⁴²⁹ *Katanga and Ngudjolo*, PTC I, 13 May 2008.

⁴³⁰ *Ibid.*, p. 23, para. 49.

⁴³¹ *Ibid.*, para. 66.

‘to be attached’ to the procedural status of victim at the pre-trial stage of a case.⁴³² Pursuant to the approach contemplated above, the instances warranting the intervention of victims in the course of the criminal justice process are determined in a comprehensive way at the outset of proceedings. Hence, the scope of the victims’ participation rather than being decided on a case-by-case basis in light of the circumstances of the proceedings of a given case is contemplated in the abstract and in principle, irrespective of the specificities of each case. Consequently, the modalities of participation elaborated by the Chamber rather than reflecting the personal interests of victims arising from the circumstances and the specificities of the case at hand, emanate from the common interests of any victim in general.

Such a ‘systematic approach’ towards the manner of participation of victims in proceedings neither corresponds to the wording, nor to the spirit of article 68(3) and the complementing provision of rule 89(1). A general determination of the manner of victims’ intervention before the ICC outside the context of actual proceedings taking place before the Chamber is inconsistent with the rationale underlying the general victims’ participation scheme. Such a comprehensive determination of victims’ intervention appears random and speculative, as it is not tailored to the specificities of a given case and, accordingly, its implication on the personal interests of participating victims. Furthermore, the establishment of modalities of participation explicitly confined to several sets of rights does not constitute a creative interpretation of the legal framework as set forth by the Court’s founders, but is a judicial exercise in redrafting the existing normative basis. Interestingly enough, the Chamber in support of its approach of establishing sets of rights for victim-participants referred to the codes of criminal procedure of national jurisdictions ‘which clearly pre-establish the set of procedural rights that [...] victims can exercise at the pre-trial stage of a case.’⁴³³ This judicial reasoning, however, fails to distinguish the different legal nature of the codes of criminal procedure, on the one hand, and judicial decisions, on the other. While the former represent sources of law and, as such, are the result of a legislative activity, the purpose of judicial decisions is confined to interpreting and applying the existing legal framework to the circumstances of a particular case. Hence, since the judges of the ICC, akin to their colleagues at the national and international level alike do not have legislative authority, the jurisprudence of the Court

⁴³² *Ibid.*, para. 79.

⁴³³ *Ibid.*, para. 50, footnote. 61.

cannot complement the ICC's normative basis. As aptly put, albeit in a different context, such a 'departure from the intention of the drafters in order to give effect to a creative interpretation of the Statute would appear to be an inappropriate arrogation of the legislative function by the judiciary'.⁴³⁴

In addition, determining beforehand, in a conclusive way and in the abstract the scope of victims' intervention in proceedings could neither encompass, nor preview all instances which may arise in the course of the proceedings with a bearing on the personal interests of participating victims, thus warranting their intervention. Therefore, in practical terms a predetermination in advance could be regarded as a double-edged sword. On the one hand, victims would be prevented from participating at instances, which albeit having a bearing on their personal interests, would fall outside the modalities of participation set in advance by the Chamber. As a result, in effect, the right of victims to intervene in proceedings would be unduly limited by depriving victims of the possibility to present their views and concerns on (an) issue(s) affecting their personal interests. On the other hand, it would suffice for a victim wishing to intervene to invoke a category of rights (a modality of participation) elaborated by the Chamber, irrespective of whether the issue or the proceeding at stake would indeed affect the victim's personal interests. As a consequence, the proceedings could be flooded with victims intervening on issue(s) with no bearing whatsoever on their personal interests. Such a scenario would, on its part, unduly delay the proceedings. Delay in proceedings, as previously observed, would eventually infringe, among others, also the rights of the victims themselves.

5.2. Contextual ('Casuistic') Determination of Modalities of Participation

By contrast to the 'systematic approach', initially favoured by PTC I, the jurisprudence of the Court at present reveals a preference towards the case-by-case determination of the appropriate proceedings and the manner of victims' involvement.⁴³⁵ The reference 'casuistic' emphasizes the distinction between this approach and the 'systematic approach' introduced initially by PTC I.⁴³⁶ Pursuant to the casuistic approach, the manner

⁴³⁴ See para. 11 of the Joint Separate opinion in *Ruto and Sang* case to the Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013.

⁴³⁵ The importance of and the need for a case-specific approach is underlined also by commentators. See in this strain the Independent Panel of Experts Report, *supra* note 427, p. 12 *et seq.*

⁴³⁶ *Katanga and Ngudjolo*, PTC I, 13 May 2008.

of participation of victims in a given case is fashioned to the specificities of the circumstances at hand. The modalities of victims' intervention in the course of the proceedings are contemplated in a non-exhaustive way by the Chamber in charge of the proceedings.⁴³⁷ Consequently, the modalities envisaged by the relevant Chamber are without prejudice to any (different, unanticipated, etc.) instances which may arise throughout the proceedings necessitating an assessment on a case-by-case basis of the specific manner and extent of the intervention of victims in light of the particular proceeding or issue at stake. Hence, pursuant to this approach specifying the manner and the extent of intervention is not a once-and-for-all event and, thus, should be tailored to the specific issues arising in the course of the actual proceedings.

Along these lines, for instance, the Trial Chamber in the *Lubanga* case⁴³⁸ proclaimed that the question of whether the personal interests of victims are affected is necessarily fact-dependent and 'should be decided on the basis of the evidence or issue under consideration at any particular point in time'. This opinion was based on the observation that 'although in a general sense, victims have multiple and varied interests [...] in order to participate at the present trial these interests must relate to the evidence and the issues the Chamber will be considering during the trial'.⁴³⁹ In the same spirit, the Trial Chamber in the *Katanga and Ngudjolo* case observed that the determination of the appropriate time and modalities of exercising the victims' right to intervene are case-dependent. The Chamber further stated that its discretion in this regard should be exercised in light of various factors, such as 'the nature and scope of the charges, the number of victims taking part in the proceedings and the degree of similarity between their respective interests, as well as the manner in which they are represented'.⁴⁴⁰ Similarly, PTC II ruled that applications for participation at the situation stage are to be submitted to the Chamber only when an issue arises which would require a judicial determination or with respect to which victims have applied to participate with the view of presenting their views and concerns.⁴⁴¹

⁴³⁷ This casuistic approach introduces in *Lubanga* (TC I, Decisions of 18 January 2008 and 26 June 2009) has been endorsed subsequently by the rest of the chambers. See e.g. *Katanga and Ngudjolo*, TC II, 22 January 2010.

⁴³⁸ *Lubanga*, TC I, 18 January 2008.

⁴³⁹ *Ibid.*, para. 97 and 101.

⁴⁴⁰ *Katanga and Ngudjolo*, TC II, 22 January 2010, para. 54.

⁴⁴¹ *Situation in the Republic of Kenya*, PTC II, Decision of 3 November 2010, para. 10 *et seq.*

Before proceeding with the next issue within the scope of article 68(3), an example of a manner of participation which is not prejudicial to or inconsistent with the rights of the accused or fairness, expeditiousness of proceedings is the participation, as a matter of principle, through the victims' legal representative(s), not in person. This manner of participation represents a safeguard for the fair trial rights of the accused who would not have to face in person a myriad of victims in the courtroom.⁴⁴² Furthermore, as noted in literature, legal representatives are professional counsel and, as such, they have both the skills and the ethical boundaries needed.⁴⁴³

6. Views and Concerns

The next issue to be addressed within the compass of the general victims' participation scheme is related to the rationale behind the expression 'views and concerns'. Unraveling the substance and scope of the presentation of views and concerns by virtue of article 68(3), just like the accurate interpretation of the rest of the prerequisites of this provision, delimits the intensity and the substance of the involvement of victims throughout the proceedings. Consequently, elucidating the wording 'views and concerns' would enhance the proper discernment of the extent to which victim-participants are entitled to intervene and to make their contribution to the conduct, development and/or outcome of a given process.

6.1. Connotation of the Notion 'Views and Concerns'

In its aspiration to bring to light the proper meaning of the expression 'views and concerns' the Court has suggested an elaborate study of the wording of article 68(3) employed in the different versions of the Statute (Spanish, French, Russian). As a result, the Court has concluded that the term 'views' in the context of article 68(3) signifies 'opinion, stance or position on a subject', while 'concerns' signify 'matters of interest to a

⁴⁴² See in the same vein Spiga, *supra* note 10.

⁴⁴³ *Ibid.*, p. 1384, where the author opines that victims' participation must not be allowed at all costs. Safeguards for the fair trial rights of the parties is the manner of participation – predominantly, as a rule, in a vicarious way, through a legal representative. Also, as duly noted by the author, most procedural rights are employed by the legal representatives in view of the fact that as professional counsel they have both the skills and the ethical boundaries needed.

person; matters that preoccupy him/her.’⁴⁴⁴ Consequently, the expression ‘views and concerns’ has been construed to denote ‘opinion and preoccupations’.⁴⁴⁵ Interpretation in the same vein has been advanced by the Prosecutor, who contended that the presentation of views and concerns is ‘a right to present [the victims’] *personal perspective* or *opinion* on an issue [emphasis added]’.⁴⁴⁶ Put differently, the views and concerns of victims ‘are referable to the cause that legitimizes their participation, the cause that distinguishes them from other victims, namely their personal interests to the extent that they are affected by the proceedings.’⁴⁴⁷

Given the above, it is reasonable to infer that as regards issues arising in the course of the proceedings which have a bearing on the personal interests of participating victims, the latter are entitled to voice their stance, convey their emoting⁴⁴⁸ and put forward their preoccupations on the issue at stake.⁴⁴⁹ The range of issues on which victims can express views and concerns cannot be determined in advance in view of the necessity for a case-by-case determination of whether a given issue has a bearing on the victims’ personal interests. Consequently, as noted in the legal literature, the views and concerns of victims may refer to ‘anything related to the proceedings, from relaying personal experiences to discontent related to the speed or efficiency of the trial.’⁴⁵⁰

6.2. Substance and Extent of the Presentation of Views and Concerns

Along this strand of thoughts the issue that comes to the surface concerns the exact substance and extent of the victims’ right to be heard and its impact on proceedings. The question arises as to how far victims could intervene in the criminal justice process through the presentation of views and concerns. The related provisions in the Rules, namely rule 89 and rule 91, shed some light on this issue, however, only to a certain

⁴⁴⁴ Separate opinion of Judge G.M. Pikis to the Decision of the Appeals Chamber of 13 June 2007, para. 15.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ *Lubanga*, Appeals Chamber, 11 July 2008, para 72.

⁴⁴⁷ Separate opinion of Judge G.M. Pikis to the Decision of the Appeals Chamber of 13 June 2007, para. 16, as well as Dissenting opinion of Judge Pikis to the Judgment of the Appeals Chamber of 11 July 2008.

⁴⁴⁸ Ian Edwards, ‘An Ambiguous Participant. The Crime Victim and Criminal Justice Decision-Making’, *British Journal of Criminology*, vol. 44 (2004), pp. 967-982, p. 979.

⁴⁴⁹ Similarly, the Victims Participation Unit at the Special Tribunal for Lebanon has contended that ‘views and concerns’ ‘should be broadly understood as encompassing various forms of input of both legal and factual nature, and concerning both the crime itself and the course of the criminal proceedings at hand.’ – see *Ayyash et al.*, STL-11-01/PT/PTJ, VPU Submission on Legal Issues pursuant to the Pre-Trial Judge’s Decision of 5 April 2012, 23 April 2012, para. 35.

⁴⁵⁰ McDermott, *supra* note 33, p. 41.

extent. According to these norms the expression of victims' views and concerns may take the form of opening and closing statements, written or oral observations or submissions. In addition, the views and concerns of victims may touch upon elements of evidence having a bearing on their personal interests. As rule 91(3) itself proclaims, in order to give effect to article 68(3), victims are afforded the possibility to engage in the examination of oral evidence *via* their legal representative upon the authorisation of the Chamber. Thus, logically the views and concerns as envisaged in article 68(3) may take the form of questions to witnesses, experts and the accused. Through the presentation of views and concerns in the form of questioning, victims are afforded the possibility to bring to the attention of the Chamber relevant information with a bearing on their personal interests elicited from the respective witness, expert or the accused.

In addition, through the expression of their views and concerns victims could contribute towards the elucidation of the wider background against which the events falling within the subject-matter of the case took place. As noted in the legal literature, the presentation of victims' views and concerns could enhance the better understanding of the Court of the particular circumstances of the case, as it 'puts the [alleged] crimes in perspective by giving an idea of the reality in times of conflict'.⁴⁵¹ To the same effect, the Court itself has acknowledged that the presentation of the victims' views and concerns may 'potentially enable the Chamber to better understand some of the matters at issue, given [the victims'] local knowledge and social and cultural background.'⁴⁵² Hence, through their views and concerns victims may provide the Chamber with their local knowledge of the background of the case.⁴⁵³

Doubtlessly, the views and concerns of victims could enhance the Court's understanding of the socio-cultural specificities of the region where the alleged crimes have been committed. They could also shed light on specific circumstances on the ground of which the Court does not have enough experience and/or knowledge, such as, for instance, particular cultural factors affecting the evidence of witnesses.⁴⁵⁴ In addition, by

⁴⁵¹ Cohen, *supra* note 22, p. 373.

⁴⁵² *Katanga and Ngudjolo*, TC II, 22 Jan 2010, para. 75.

⁴⁵³ *Katanga and Ngudjolo*, TC II, 03 March 2010, para. 60.

⁴⁵⁴ See, for instance, International Federation for Human Rights (FIDH), 'Enhancing Victims' Rights before the ICC. A view from Situation Countries on Victims' Rights at the International Criminal Court', November 2013, where it is noted that '[v]ictims shed light on the issue of identity and the use of names [in the] DRC' (at p. 20), as well as that '[a]t various stages of the *Bemba* case (CAR), victims' legal representatives from the field clarified the relevance of different languages spoken by the different actors in CAR during the commission of the crimes.' Further in the same vein, take heed, for instance, of some regions in Africa where people live in an oral

conveying their stance and/or preoccupations regarding issues which affect their personal interests victims may draw the attention of the Chamber to information germane to the subject-matter of the case at hand. The victims' views and concerns could as well bring forth certain issues related to the conduct of proceedings, including concerning the collection and/or the examination of evidence. The fact that the views and concerns of victims may assist the Chamber in its approach to the evidence in the case has likewise been acknowledged in the jurisprudence.⁴⁵⁵

6.3. Non-evidentiary Character of Victims' Views and Concerns

Still, notwithstanding the potential of the victims' views and concerns to enhance the Court's understanding of the particulars of the case, it is essential to note that they do not as such constitute pieces of evidence, thus, do not form part of the evidentiary material. By conveying their stance and/or preoccupations regarding issues which affect their personal interests victims may draw the attention of the Chamber to information relevant to the subject-matter at hand. However, the information contained in the views and concerns cannot as such be incorporated into the evidentiary material. As rules 89 and 91 unequivocally show, the regime governing the presentation of views and concerns by victims is separate and distinct from the regime applicable to the submission of evidence. None of the manners of presentation of victims' views and concerns provided for in rule 89 and 91, *i.e.* through submissions, observations or statements, represents a technique of placing evidence before the Chamber. Furthermore, the presentation of views and concerns is not subject to the regime governing testimonies set forth in articles 69(1) and 70. This lends further support to the conclusion that the presentation of views and concerns does not in itself represent a submission of testimony or any other type of evidence.⁴⁵⁶

tradition and, accordingly, report information as eyewitnesses, irrespective of whether they have perceived the facts in person or have heard them recounted by someone else. If the Court is not aware of such a specificity of a particular culture or region, the reliability and credibility of witness testimony may be put at issue. A similar scenario unfolded in proceedings before the ICTR, during the *Akayesu* trial proceedings, where it became clear that evidence that had been reported as an eyewitness account was in fact a second-hand account. *See The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Chamber I, Judgment, 2 September 1998, para. 155.

⁴⁵⁵ *Lubanga*, TC I, 26 June 2009, para. 25.

⁴⁵⁶ Similarly, the Prosecutor has observed that the views and concerns of victims do not constitute submission of evidence – *see Lubanga*, Appeals Chamber, 11 July 2008, para. 72.

This line of reasoning entails a negative answer to the question whether the presentation of victims' views and concerns could 'mask' the submission of evidence on the part of victim-participants 'under the guise of unsworn allocution'.⁴⁵⁷ The considerations advanced hitherto that expressing views and concerns before the Court is not tantamount to placing oral evidence related to the subject-matter of the proceedings at hand engender the following issues. The first question that comes to the fore concerns the possibility of a victim-participant to assume simultaneously the capacity of a witness in the ICC's proceedings for the purpose of incorporating his or her recollections of the events under consideration into the evidentiary material, subject to the requirements of relevance and admissibility. Another essential issue within the context of the ICC's evidentiary procedure and the place of victims therein is whether and, if yes, in what way and to what extent victim-participants could engage in the fact-finding process of their own accord (that is, through the submission and/or the examination of evidence). The elucidation of the matters just raised is pivotal for the further delimitation of the place of victim-participants in the ICC's system and the extent to which their involvement in the proceedings could contribute to and impact the evidentiary process and, ultimately, the outcome of the case. In the chapters to follow each of the two issues is addressed from a comparative perspective, in light of the specificities of the ICC's procedural architecture and the principles governing the fact-finding process in proceedings adjudicating the individual criminal responsibility of the accused, as well as in reparation proceedings.

⁴⁵⁷ Giannini, *supra* note 343, p. 446 citing Amy Baron-Evans, 'Traps for the Unwary Under the Crime Victims' Rights Act: Lessons from the Kenna Cases', 19 *Federal Sentencing Report* 49, 51-52 (2006) at footnote 64.

CHAPTER FOUR

Duality of Status

The fact that the presentation of views and concerns is not in itself a means by which the victim's account of the crime(s) under consideration could be incorporated into the ICC's evidentiary material brings forth the question as to the manner in which victims could place oral evidence before the Chamber germane to the subject-matter of the proceedings at hand. In other words, the issue that comes to the fore concerns the so called 'duality of victim-witness status'. As the latter expression implies, it refers to individuals who assume simultaneously two legal standings in the criminal justice process – of a victim-participant and of a witness appearing before the Court.

To start with, it is to be noted that the notion 'duality of status' is not to be found in the ICC's constitutive instruments. The Court's founding documents do not contain provisions related specifically to individuals with victim-witness status.⁴⁵⁸ Instead, separate sets of legal texts envision the standing and the rights of victims and of witnesses in the proceedings. Notwithstanding the lack of an explicit legal text referring to dual status individuals in the ICC's founding documents, the questioning of victims is envisioned in article 54(3)(b) within the purview of the prosecutorial powers during an investigation. To the same effect is rule 72(2), governing the questioning of a victim of sexual violence at trial. In the same spirit, rule 88(5) casts a duty on the Chamber to be vigilant in controlling the manner of the questioning of a victim, so as to avoid any harassment or intimidation of this individual. Logic, therefore, dictates that the ICC's legal framework accommodates the possibility of a victim to assume the parallel capacity of a witness in proceedings.⁴⁵⁹

Still, at the inception of the ICC some commentators have advanced the view that 'in order fully to safeguard the rights of the accused' the combination between victim and witness status in one and the same case before the ICC should not be allowed.⁴⁶⁰ Not

⁴⁵⁸ As has been noted, neither the Statute, nor the Rules clarify the relationship between participating victims and victim-witnesses – see Haslam, *supra* note 360, p. 327.

⁴⁵⁹ See in the same vein, Baumgartner, *supra* note 22, p. 433, who observed that '[n]either the Statute nor the Rules excludes [sic] victims from participating in the proceedings to testify as witnesses.'

⁴⁶⁰ Jorda and de Hemptinne, *supra* note 1, according to whom 'it will be necessary to ensure that a victim may not simultaneously *be a witness and a party* in one and the same case' (italics in the original).

surprisingly, this standpoint remains isolated and unpopular both among academics and in practice. Such a proposition is not only contrary to the rationale of the provisions discussed above, but it also neglects the fact that victims are individuals with personal (whether direct or indirect) experience and perceptions relevant to the ascertainment of the circumstances of the case. As highlighted earlier, the eligibility of an individual *qua* victim pursuant to rule 85(a) is premised, *inter alia*, on the requirement that he or she has suffered harm as a result of (a) crime(s) within the jurisdiction of the Court. Hence, the eligible harm is the damage inflicted upon the individual through the alleged commission of the particular crime(s) under consideration. Consequently, victims possess personal (often first-hand) experience and perception of facts comprised by the subject-matter of the proceedings at hand. Indubitably, the account of circumstances relevant to the case perceived personally by the victim could contribute to the elucidation of the facts under consideration. Since a victim's testimony may represent a valuable piece of evidence, by implication victims could also appear as witnesses in the same case.

A similar standpoint is endorsed in the literature on international criminal proceedings in general. It is widely acknowledged that by virtue of their unique situation during the conflict victims would be in the best position to help unearth the truth of the alleged crimes.⁴⁶¹ Commentators rightly note that victims are those who have witnessed the crime(s) and also live with the consequences of these crime(s)⁴⁶² and, therefore, without victims and witnesses the criminal justice bodies have little chance of success.⁴⁶³

Along the same lines is the legislative approach adopted by the majority of jurisdictions which afford victims an independent standing at the criminal justice scene. The swift comparative review of national and international jurisdictions attests to the fact that duality of victim-witness status is a well-established procedural phenomenon.

⁴⁶¹ David S. Sokol, 'Reduced Victim Participation: A Misstep by the Extraordinary Chambers in the Courts of Cambodia', *Washington University Global Studies Law Review*, vol. 10 (2011), pp. 167-186.

⁴⁶² Cohen, *supra* note 22, p. 353.

⁴⁶³ Chea Leang and William Smith, 'The Early Experience of the Extraordinary Chambers in the Courts of Cambodia' in *International Criminal Justice. Law and Practice from the Rome Statute to Its Review*, Roberto Bellelli (ed.), Ashgate, pp. 143-168, p. 158.

1. Approaches Towards Duality of Status at the Domestic Level

The combination of the status of victim with the capacity of a witness in the same proceedings is a common feature of most national legal systems which provide victims with an autonomous standing in proceedings, distinct from that of a witness.⁴⁶⁴ Pursuant to the respective legal frameworks an individual is not exempt from the duty to testify as a witness, in spite of his or her participation in proceedings as an injured party (damaged person/victim)⁴⁶⁵; as a private accuser (subsidiary prosecutor/private (accessory) prosecutor)⁴⁶⁶; as a complainant or a plaintiff (known as ‘querellante’ in Latin American jurisdictions)⁴⁶⁷; as a civil party (civil claimant/plaintiff)⁴⁶⁸ or as a victim-participant with an independent position in proceedings.⁴⁶⁹ Hence, the majority of national jurisdictions stipulate not merely the right, but the obligation of the victim to assume the parallel capacity of a witness in the same case. In most systems, the questioning of the victim is

⁴⁶⁴ Romania represents an exception in this regard. According to article 82 of the Criminal Procedure Code the harmed party may be heard as a witness only if he or she does not constitute him- or herself as a civil party and will not take part in the trial as a victim. Hence, the victim is deprived from the possibility to assume the status of a witness in the same case.

⁴⁶⁵ Article 158 of the Criminal Procedure Code of Albania; article 59(2)(2) of the Criminal Procedure Code of Armenia; article 86(10) of the Criminal Procedure Code of Bosnia and Herzegovina; chapter 6, section 7(1)(5) of the Criminal Procedure Act of Finland; article 72 of the Criminal Procedure Code of Ukraine; article 55(1) of the Criminal Procedure Code of Uzbekistan; article 196 of the Criminal Procedure Code of Nicaragua; Article 55(3) of the Criminal Procedure Code of Macedonia, article 60(2) of the Criminal Procedure Code of Moldova. By virtue of article 294-2 of the Criminal Procedure Code of South Korea, in case a victim avails him- or herself of the right to file a petition for giving a statement in the course of the proceedings, the Court shall admit such victim as witness for examination.

⁴⁶⁶ Article 305 of the Criminal Procedure Code of Honduras; article 95(2) of the Criminal Procedure Code of Montenegro; article 92 of the Criminal Procedure Code of Serbia; article 87.7.4 of the Criminal Procedure Code of Azerbaijan; article 283(2) of the Criminal Procedure Code of Croatia; article 50(1) and (2) of the Criminal Procedure Code of Kyrgyzstan; articles 325-326 of the Criminal Procedure Code of Taiwan; article 212 read in conjunction with articles 215-216 of the Criminal Procedure Code of Swaziland.

⁴⁶⁷ Articles 67, 80, 86 and 96 of the Criminal Procedure Code of Argentina; article 292 of the Criminal Procedure Code of Bolivia; article 80 of the Criminal Procedure Code of Costa Rica; article 134 of the Criminal Procedure Code of Guatemala; article 204 of the Criminal Procedure Code of Paraguay; article 112 of the Criminal Procedure Code of El Salvador; article 123 of the Criminal Procedure Code of the Dominican Republic.

⁴⁶⁸ Article 61(4) of the Criminal Procedure Code of Armenia; article 53(3) of the Criminal Procedure Code of Kyrgyzstan; article 96 of the Criminal Procedure Code of Peru.

⁴⁶⁹ Book II of the Criminal Code of Malta (Malta does not have a separate Criminal Procedure Code, Book II of the Criminal Code is entirely devoted to procedural issues). See also Jean Paul Grech, ‘Criminal Justice Systems in Europe and North America: Malta’, in *Criminal Justice Systems in Europe and North America*, HEUNI, 2006, The European Institute for Crime Prevention and Control, affiliated with the United Nations. Up until 2002 the victim in Malta could only participate as a witness. After the amendments in 2002 the victim has an independent participant standing in proceedings with a number of rights, such as: the right to engage a legal representative, to examine witnesses, to produce evidence; to be a principal witness him- or herself. According to section 410(4) of Book II of the Criminal Code, the injured party has the right to be present in court in all hearings even if he or she is a witness.

governed by the same provisions applicable to the questioning of witnesses.⁴⁷⁰ The majority of domestic jurisdictions, with a few exceptions,⁴⁷¹ introduce the possibility that witnesses be compelled to appear in proceedings for the purpose of testifying. Consequently, by implication, victims may likewise be obliged to appear before the criminal justice authorities in order to give their account of facts relevant to the case. At this point it is worth noting that the lack of a prohibition against the dual status of victim and witness in the same case in national jurisdictions has also been acknowledged in the ICC's jurisprudence as early as the issue of the combined victim-witness status arose.⁴⁷²

2. Approaches Towards Duality of Status at the International Level

2.1. Criminal Justice Bodies

At the international level, criminal justice bodies follow a similar approach towards the issue of dual status individuals. The analysis of international(ized) adjudicative institutions shows that such jurisdictions either do not contain provisions prohibiting the parallel participation as a victim and as a witness in the same case or explicitly provide for the combination of a formal victim status in proceedings with the capacity of a witness. Akin to the majority of domestic jurisdictions, international(ized) criminal justice bodies which grant victims a standing in their own right, whether as parties or as non-party participants, also afford the possibility of victims to give testimony.

The ECCC, where victims enjoy the status of civil parties in proceedings, provides an intriguing example in this respect. Although rule 23(4) of the ECCC's Internal Rules may at first blush be construed as prohibiting the incorporation of a victim's statement

⁴⁷⁰ See e.g. article 118(1)2 of the Criminal Procedure Code of Bulgaria; section 397(1) of the Criminal Procedure Code of Germany; article 410 read together with article 416 of the Law on Criminal Procedure of Spain; section 37(3) of the Criminal Procedure Code of Estonia; chapter 6, section 7(2) of the Criminal Procedure Act of Finland; article 55(3) of the Criminal Procedure Code of Macedonia; section 151(1) of the Criminal Procedure Code of Latvia; articles 58(10) and 60(5) of the Criminal Procedure Code of Moldova; chapter 28, section 411(2) and (3) of the Criminal Procedure Act of Norway; article 100 of the Criminal Procedure Code of China; article 160 of the Criminal Procedure Code of Indonesia.

⁴⁷¹ Thus, for instance, pursuant to section 38(1)(3) of the Criminal Procedure Code of Estonia the victim has the right to refuse to give testimony; according to section 98(2) of the Criminal Procedure Code of Latvia, the victim cannot be compelled to testify; in Russia the victim can refuse to testify under specific circumstances – see articles 42(2), 78(1) and (2), 277(2) of the Criminal Procedure Code.

⁴⁷² *Katanga and Ngudjolo*, PTC I, Decision on the Application for Participation of Witness 166 ICC-01/04-01/07-632, 23 June 2008 (*Katanga and Ngudjolo*, PTC I, 23 June 2008), para. 21, where the Chamber draws on the legal frameworks of various civil law jurisdictions, such as Brazil, France, Germany, Spain.

into the evidentiary material once the latter assumes civil party status, such an inference would prove rather hasty and, ultimately, incorrect. According to this provision, once a victim becomes a civil party he or she can no longer ‘be questioned as a *simple* witness in the same case and [...] may only be interviewed under the same conditions as a [c]harged [p]erson or [a]ccused [emphasis added]’. The relevant legal regime governing the questioning of a civil party is set out in rule 59 of the Internal Rules, whereas the legal regime governing the questioning of ‘simple’ witnesses is laid down in rule 60 of the Internal Rules. The juxtaposition between these two concurrent procedures, however, shows that the differences are confined to the manner in which civil party’s statement(s), on the one hand, and ‘simple’ witnesses’ statements, on the other, are to be placed before the criminal justice authorities for the purpose of their incorporation into the evidentiary material. The two regimes differ in terms of the stipulation of compellability, taking of an oath or affirmation, presence of a lawyer during questioning and the initiative upon which the statement is being gathered.⁴⁷³ At the same time, notwithstanding the differences just mentioned, both the questioning of witnesses and the interview of civil parties represent methods of gathering evidence. Witnesses’ testimonies and civil parties’ statements alike (to the extent to which they give account of facts relevant to the case) are pieces of oral evidence. Indicative in this regard is rule 91 of the Internal Rules which provides that after the questioning of the accused, the Chamber shall hear the civil parties, witnesses and experts. Hence, albeit the victim who has assumed civil party status can no longer be formally referred to as a ‘simple’ witness, the statements of a civil party when questioned form part of the evidentiary material.

The evidentiary character of the statements given by civil parties during their interviews in the course of the proceedings has also been explicitly acknowledged in the jurisprudence of the ECCC. After observing that due to their civil party status victims were no longer questioned as witnesses and were exempt from the requirement to testify

⁴⁷³ Firstly, according to rule 24 of the Internal Rules before testifying witnesses shall take an oath or affirmation to state the truth. By contrast, no such obligation exists with respect to a civil party when interviewed. As a consequence, civil parties, unlike witnesses, cannot be held accountable for giving false statement(s) in accordance with rule 36 read together with rule 35(2) of the Internal Rules. Secondly, witnesses may be compelled to appear before the Court in order to testify by virtue of rule 60(3) of the Internal Rules. The legal framework lacks a similar provision with respect to civil parties. Thirdly, rule 59(2) of the Internal Rules envisions that the interview of a civil party shall take place only in the presence of his or her lawyer, unless the civil party waives this right. Conversely, ‘simple witnesses’ are not entitled to the presence of a lawyer, except for instances related to issues of self-incrimination. Fourthly, civil parties may also be interviewed upon the civil party’s own request in accordance with rule 59(5) of the Internal Rules. Witnesses, on their part, appear before the Court only when summoned, thus, not on their own initiative.

under an oath or affirmation,⁴⁷⁴ the Trial Chamber in Case 001 noted that civil parties ‘may nevertheless testify and have their statements put before the Chamber and assessed as evidence where relevant and probative.’⁴⁷⁵ Consequently, this ruling endorsed the evidentiary nature of the civil parties’ statements given during their questioning at trial.

Similarly, at the STL where victims are granted the standing of independent participants in their own right, the legal framework envisions the possibility for the concurrent appearance of a victim-participant in the capacity of a witness in proceedings. Recent developments in the Tribunal’s legal framework reveal a drift towards the enhanced possibility of victims to contribute to the evidentiary material by way of their testimony. More specifically, rule 150(d) of the Rules (as amended of 8 February 2012) extends the right of victims to give evidence as witnesses in proceedings. According to this provision, ‘[a] victim participating in the proceedings may be permitted to give evidence if a Chamber decides that the interests of justice so require.’ Conversely, the repealed version of rule 150(d) of the Rules provided that a victim participating in the proceedings should not be permitted to give evidence unless a Chamber decided that the interests of justice so require. Hence, the present redaction of this provision reveals a shift away from the restrictive approach and an inclination towards a more permissive regime with respect to duality of victim-witness status.

The same rationale finds reflection in the STL’s jurisprudence. The Pre-Trial Judge observed that ‘[t]he fact that a person may act in the capacity of a witness shall not serve to deprive that person of his rights to participate in proceedings as a victim.’⁴⁷⁶ This ruling represents an eloquent acknowledgement of the fact that the concurrent participation as a witness and as a victim-participant in the same proceedings places the individual personally affected by the events under consideration at an independent standing going beyond the role of a mere ‘evidentiary cannon fodder’ or, in other words, of a mere information-provider.⁴⁷⁷ In a subsequent decision⁴⁷⁸ the Pre-Trial Judge acknowledged that the Tribunal’s legal framework provides ‘for the circumstance where a [victim-participant] – notwithstanding his [or her] capacity as a [victim-participant in

⁴⁷⁴ ECCC, Case 001, Case File/Dossier No. 001/18-07-2007/ECCC/TC, Trial Chamber Judgment, 26 July 2010 (ECCC, Case 001, Trial Judgment, 26 July 2010), para. 52.

⁴⁷⁵ *Ibid.*, para. 78.

⁴⁷⁶ Ayyash *et al.*, Pre-Trial Judge, Decision on Victims’ Participation in the Proceedings, 8 May 2012, para. 102(i).

⁴⁷⁷ Edwards, *supra* note 448, p. 976.

⁴⁷⁸ Ayyash *et al.*, Decision of the Pre-Trial Judge of 18 May 2012, para. 60.

proceedings] is called to give evidence as a witness.’ The Pre-Trial Judge adopted the term ‘dual status victims’ as coined in the ICC’s jurisprudence.

Comparatively speaking, it follows that, irrespective of whether giving testimony by dual status individuals is governed by the regime applicable to the questioning of witnesses or by a specific set of provisions,⁴⁷⁹ the combined victim-witness status proves neither a novel, nor an exceptional criminal justice phenomenon in an international and in a domestic setting alike. This legislative approach is hardly surprising given the fact that individuals who have personally experienced facts and circumstances relevant to the case represent an essential source of information conducive to the elucidation of the subject-matter of the case at hand.

2.2. Other Adjudicative Bodies

Notably, an understanding in a similar vein transpires in proceedings taking place outside the purview of international criminal trials. International arbitral proceedings, as well as proceedings before the ICJ also accommodate the possibility for an individual who has personally perceived facts relevant to the case to provide testimony, irrespective of whether he or she assumes another procedural capacity in the same case.

In this respect, the Rules on the Taking of Evidence in International Arbitration of the International Arbitral Tribunal accommodate the possibility for ‘[a]ny person [to] present evidence as a witness, including a [p]arty or a [p]arty’s officer, employee or other representative.’⁴⁸⁰ In a similar fashion, the ICJ has arranged on several occasions for the cross-examination of counsel of one of the parties, thus, has admitted the parallel appearance of counsel as a witness in the same proceedings. As a result, counsel’s pleadings that contained relevant factual information within his or her knowledge were treated as testimony, while the remainder of the counsel’s pleadings were not treated as factual assertions, but as legal argument.⁴⁸¹ In these instances the ICJ has held that

⁴⁷⁹ For instance, at the ECCC while the questioning (interview) of witnesses is governed by rule 60, the questioning (interview) of a civil party is envisaged in rule 59 of the Internal Rules.

⁴⁸⁰ See article 4(2) of the Rules.

⁴⁸¹ Anna Riddell and Brendan Plant, *Evidence before the International Court of Justice*, British Institute of International and Comparative Law, 2009, p. 342-343. See the cases discussed therein, namely, the case of *Elettronica Sicula S.P.A. (ELSI case)*, I.C.J. Reports 1989, p. 15, the case of *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, I. C. J. Reports 1997, p. 7, where a member of the Slovak team of pleaders was introduced as an expert witness. The same happened in the *Pulp Mills on the River Uruguay* case where the International Court of Justice admonished the parties for having included in their legal teams ‘experts who appeared as

individuals providing evidence before the Court based on their scientific and/or technical knowledge and on their personal experience should testify as experts, witnesses or in some cases in both capacities rather than plead as counsel, so that they may be submitted to questioning (and, ultimately, have their testimony incorporated into the evidentiary material pertinent to the subject-matter). Consequently, the ICJ has given preference to the individual's capacity as a witness, *i.e.* as a source of factual information, rather than to his or her professional capacity as a party's lawyer.

In this respect, it should, however, be strongly underlined that an approach allowing the parallel appearance of counsel as a witness in the same case should not be accepted without demur. The simultaneous participation as a witness and as a person adducing legal argument on behalf of a party is far from unproblematic. By giving factual evidence as a witness the individual serves the interests of justice, thus, contributes to the establishment of the truth, irrespective of whether the information he or she adduces would eventually serve the interests of either party. At the same time, participation as counsel serves exclusively the interests of the represented party, *i.e.* counsel's client. Thus, by virtue of his or her professional obligations counsel may see fit not to disclose certain facts and circumstances that would seem inimical to the interests of his or her client. Consequently, the combined witness-counsel status may give rise to an insurmountable conflict of interests: between counsel's professional duty towards his or her client, on the one hand, and the duty to contribute to the establishment of the truth ensuing from the witness capacity.

Similar caveats against such a 'confusion of roles'⁴⁸² between counsel and witness have been voiced by commentators,⁴⁸³ as well as in the relevant practice. Before the ICJ, for instance, albeit counsel agreed to be questioned as a witness, he objected in principle against such a possibility by insisting that lawyers should not be admitted as witnesses in proceedings affecting, directly or indirectly, their client's interests.⁴⁸⁴

That said, the overall comparative review of international(ized) jurisdictions lends support to the conclusion that, unless the combination of different statuses would entail a

counsel' – see *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, I.C.J. Reports 2010, p. 14.

⁴⁸² *Ibid.* The authors take the correct stance that whoever appears or speaks as an advocate of a party shouldn't assume another procedural status concurrently.

⁴⁸³ *Ibid.*

⁴⁸⁴ See in more detail *ibid.*, pp. 342-343, in particular, the discussion of this issue in the *ELSI* case.

conflict of interests ('confusion of roles'), an individual with a formal standing in proceedings, such as a victim, should not in principle be prohibited from appearing simultaneously as a witness in the same case.

3. Duality of Status in the Context of Trials of Mass Atrocities

Notwithstanding the considerations advanced hitherto, it would be wrong to assume that victim status would automatically entail the concurrent capacity of a witness in the ICC's proceedings. The personal appearance in a witness capacity of each individual recognized as a victim pursuant to rule 85(a) would be both unwarranted and unfeasible. One salient caveat in this regard ensues from the potentially high number of individuals qualifying as victims in the ICC's process, which would render impossible the personal appearance of each before the Court. Furthermore, the principle of expeditiousness as 'one of the core components of fairness of the proceedings'⁴⁸⁵ together with the overarching criminal justice tenets of efficiency and expediency dictate that not *all* evidence which is admissible and relevant as provided for in article 69(4) should be gathered in proceedings taking place at the international arena. Throughout the fact-finding process concerning large scale and wide-spread atrocities, such as the crimes falling within the ICC's jurisdiction, the trier of fact should employ an adroit filtering mechanism as regards the volume, the essence and the quality of information to be collected as evidence necessary for the illumination of the subject-matter of the case at hand. Pieces of evidence merely repeating or overlapping in substance, scope and focus with other evidence adduced to ascertain the facts and circumstances under consideration would be redundant. The production of evidence intended to shed light on facts which have already been established by way of other evidence would be unnecessary, thus superfluous. If admitted, repetitive evidence would lead to unwarranted delays of the criminal process to the prejudice of the proper conduct of proceedings, the due process rights of the parties, the interests of victims, and ultimately, of justice in general.

The inimical effects of the admission of superfluous evidence on the criminal process have long ago attracted the attention of commentators. In the context of criminal

⁴⁸⁵ *Ruto et al.*, PTC II, Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses, ICC-01/09-01/11-221, 25 July 2011.

proceedings in a domestic setting this issue was addressed already at the beginning of the nineteenth century by the British jurist and philosopher Jeremy Bentham, known for his ‘inimitable style’.⁴⁸⁶ Bentham, in his habitual eccentric manner of expression, observed that superfluous ‘testimony ought to be thrown out of doors’ since ‘it would add nothing to the effect of other evidence, and would in no way contribute to the discovery of the truth [...]’.⁴⁸⁷ In addition, Bentham quite reasonably noted that redundant evidence ‘occasions loss of time to the judge, and, to the parties, a proportional quantity of expense, delay, and vexation [...]’.⁴⁸⁸

Notably, nowadays, the importance of a fact-finding process aimed at collecting *sufficient*, as opposed to *all* evidence, for the proper conduct, organization, effectiveness and expeditiousness of proceedings is widely acknowledged. National jurisdictions provide limitations with regard to the quantity of the evidence to be gathered in the course of the proceedings.⁴⁸⁹ At the international level, criminal justice bodies are either vested with the authority to reject outright repetitious evidence or to employ alternative means for the incorporation of such an information into the evidentiary material, such as by accepting written statements *in lieu* of the witnesses’ personal appearance in court. This enhanced judicial control over the fact-finding procedure is a reflection of the long-standing idea in favour of ‘the need for a more activist judiciary to speed up’ the proceedings.⁴⁹⁰

⁴⁸⁶ Ian H. Dennis, *The Law of Evidence*, 3rd edition, London Sweet & Maxwell, 2007, p. 522.

⁴⁸⁷ Jeremy Bentham, ‘A Treatise on Judicial Evidence’, J. W. Paget, 1825, p. 230.

⁴⁸⁸ *Ibid.*

⁴⁸⁹ The Chilean legislator has made a rather specific restriction with respect to the quantity of evidence to be introduced by the parties, namely, each party may present up to six witnesses to prove each of the facts alleged (Articles 458 and 486 of the Criminal Procedure Code). In Honduras the Chamber in charge of the proceedings is vested with the discretion to reject evidence which is irrelevant, disproportionate, excessive or merely dilatory (Articles 199 and 317 of the Code). In Paraguay, the Chamber may limit the quantity of the evidence suggested by the parties when it is manifestly excessive (Article 173 of the Criminal Procedure Code). El Salvador provides for the exclusion of cumulative evidence, as well as of evidence leading to delay in proceedings (Article 177 of the Criminal Procedure Code). In Taiwan the Court may overrule motion for examination of evidence filed by the parties if it deems it to be unnecessary (Article 163-2 of the Criminal Procedure Code). In South Korea in case of a number of victims who had filed a petition to make a statement in the course of the proceedings concerning identical facts constituting elements of the crime(s) charged, the Court may limit the number of persons admitted to make a statement (Article 294-2(3) of the Criminal Procedure Code). This legal regime reflects the understanding about the exclusion of repetitive and/or cumulative evidence suggested by and related to victims.

⁴⁹⁰ See Cappelletti, *supra* note 277. The need for a more active role on the part of the judiciary and control of the Chamber over the proceedings is a recurring theme in the literature enunciated as early as the beginning of the last century. By reference to concerns raised by commentators at the beginning of the 20th century, the author draws the attention to ‘the progressive decline of a two-party, laissez-faire concept of [...] justice, as well as to the ‘exaggerations of the contentious procedure’. Although these observations have been made in the context of civil litigation, the ‘major trend of universal dimensions’, to which the author refers, is equally, if not even more compelling with respect to the realities of (international) criminal proceedings of today.

The legal framework governing the evidence-gathering process before the Cambodian hybrid tribunal provides the Chamber with the authority to reject outright repetitious evidence.⁴⁹¹ The STL, on its part, provides for the admission of written statements and transcripts *in lieu* of an oral testimony in circumstances where the evidence in question is of a cumulative nature, that is, when other witnesses have already given or will give oral testimony of similar facts.⁴⁹² Consequently, albeit unlike the ECCC, the STL's Chambers may not reject outright requests for the submission of repetitious evidence, they may employ alternative means of incorporation of such pieces of evidence so as to prevent undue delay of proceedings. Similar is the legal regime at the ICTY, ICTR and the SCSL where a Trial Chamber may dispense with the attendance of a witness in person and admit instead in whole or in part the evidence of a witness in the form of a written statement or transcript of evidence instead of oral testimony.⁴⁹³

The ICC provides examples of a jurisprudential acknowledgement of the importance of collecting sufficient as opposed to collecting all evidence that is relevant and admissible.⁴⁹⁴ The Court has noted that in order for a victim to be authorized to testify his or her testimony must be considered 'to make a genuine contribution to the ascertainment of the truth' and should not 'be unnecessarily repetitive of evidence already tendered by the parties.'

Considerations against the collection of superfluous evidence transpire also in international proceedings taking place outside the realm of criminal justice. A similar tendency towards disallowing the production of repetitious evidence emerges in the ICJ's proceedings,⁴⁹⁵ as well as in proceedings before the International Arbitral Tribunal.⁴⁹⁶

⁴⁹¹ This possibility is explicitly envisioned in rule 87(3)(a) of the ECCC's Internal Rules.

⁴⁹² See rule 155(A)(i)A(a) of STL's Rules of Procedure and Evidence.

⁴⁹³ Rule 92bis of ICTY, ICTR and SCSL's Rules of Procedure and Evidence.

⁴⁹⁴ See e.g. *Katanga and Ngudjolo*, TC II, Directions for the conduct of the proceedings and testimony in accordance with rule 140, ICC-01/04-01/07-1665-Corr, 1 December 2009, paras. 20 and 30; *Bemba*, TC III, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, ICC-01/05-01/08-2138, 22 February 2012, para. 23(ii), where the Chamber endorsed the understanding of Trial Chamber II as regards the admissibility of a victim's testimony at trial.

⁴⁹⁵ The ICJ has addressed the burden of superfluous evidence in its Practice Direction III, according to which '[i]n view of an excessive tendency towards the proliferation and protraction of annexes to written pleadings, the parties are [...] urged to append to their pleadings only strictly selected documents.' Albeit addressing explicitly material submitted by the parties in the written phase of proceedings, this practice direction shows the ICJ's inclination towards restraining the admission of material by the parties only to relevant material. Also worth noting in the present context is Practice Direction IX which epitomizes the tenet of expeditiousness by promoting the timely submission of documentary evidence. To this end, the practice direction stipulates that the parties should refrain from submitting new documents after the closure of the written proceedings.

⁴⁹⁶ See articles 8(2) and 9(2)(g) of the IBA Rules on the Taking of Evidence in International Arbitration (2010) which make an express stipulation to this effect. Furthermore, according to the latter provision, the International

In view of all the above it is to be concluded that, unless a particular individual's account would be conducive to the further elucidation of the subject-matter of the case, such a narrative would be redundant, thus, unnecessary. Consequently, as unique as each personal victim's and/or witness's (hi)story may seem,⁴⁹⁷ individuals will combine the status of victim with that of a witness before the ICC only as long as their personal account is deemed necessary for the illumination of the facts under examination and, as such, is intended to form part of the evidentiary material. Accordingly, as correctly noted in the Court's jurisprudence 'the fact that a victim gives evidence under oath [...] gives him or her the status of a witness'.⁴⁹⁸ In other words, the victim-witness dual status relates only to individuals who take part in the proceedings simultaneously as victims and as witnesses actually called to testify pursuant to article 69(3).⁴⁹⁹

Without embarking at this point on a comprehensive analysis of article 69(3),⁵⁰⁰ it is worthwhile to briefly sketch the leading idea behind this core legal text in the ICC's evidence-gathering process. Article 69(3) sets forth an adroit combination between a party-driven ('hands-off') mode of presenting evidence, traditionally characteristic of adversarial systems, and a judge-controlled⁵⁰¹ ('hands-on') evidence-gathering process (traditionally characteristic of non-adversarial jurisdictions).⁵⁰² Thus, while acknowledging the right of the parties to submit evidence relevant to the case, this provision likewise affords the Chamber in charge of the proceedings the authority to request the submission of all evidence that it considers necessary for the determination of the truth, *i.e.* including the testimony of a victim-participant.

Arbitral Tribunal shall, at the request of a party or on its own motion, exclude from evidence or production any document, statement, oral testimony or inspection for, inter alia, considerations of procedural economy, proportionality, fairness or equality of the parties that the Tribunal determines to be compelling.

⁴⁹⁷ *Lubanga*, TC I, Order issuing public redacted version of the 'Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial', ICC-01/04-01/06-2032, 9 July 2009 (*Lubanga*, TC I, 9 July 2009), para. 37.

⁴⁹⁸ *Katanga and Ngudjolo*, TC II, 20 January 2010, para. 88.

⁴⁹⁹ *Lubanga*, TC I, 18 January 2008, para. 132.

⁵⁰⁰ This provision is addressed in detail in the next chapter.

⁵⁰¹ See the juxtaposition between the two main evidentiary methods at the national level suggested by Mirjan Damaska in *Presentation of Evidence and Factfinding Precision*. *Faculty Scholarship Series*, 1975, Paper 1589.

⁵⁰² See in the same vein, McGonigle, *supra* note 362, p. 108.

4. Acquiring Duality of Status

Following the assertion reached above that a victim-participant before the ICC could simultaneously appear as a witness in the same case, the next issue to be explored is the way in which an individual could acquire duality of victim-witness status.

The first scenario of acquiring duality of status would take place in case a person has already been approached as a witness and only subsequently is admitted as a victim in proceedings. In this event, the witness capacity will precede the legal condition of a victim. An alternative scenario of duality of status could likewise unfold. Such would be the case when the testimony of a particular individual is deemed necessary for the establishment of facts relevant to the case following his or her acknowledgment as victim-participant.

Within the latter scenario, an individual recognized as victim may assume the status of witness if in the course of the proceedings the parties request to present evidence by way of the testimony of that victim-participant in accordance with the first sentence of article 69(3). Similarly, if the Chamber upon consideration of the requisites of article 68(3) read in light of article 69(3) determines that the personal interests of victims together with its authority to ascertain the truth necessitate the testimony of a particular victim, the latter will assume the capacity of a witness appearing before the Court.⁵⁰³

Practice shows that the different scenarios of combining victim status with the capacity of a witness contemplated above may unfold concurrently in the course of the proceedings. One such example represents the *Lubanga* trial where nine dual status individuals took part in the proceedings, six of whom had been approached as witnesses before assuming the standing of victims, whereas other three had been granted victim status before testifying. At the pre-trial phase of the case six individuals whom the Prosecutor had interviewed and whose testimony he intended to use as evidence in the confirmation of the charges hearing applied to participate as victims in the proceedings. Although these individuals were not admitted as participating victims by PTC I for the purpose of the confirmation of charges hearing, subsequently they were recognized as

⁵⁰³ See article 68(3) read in light of article 69(3). This understanding has been properly reflected in the jurisprudence of the Court. See *Katanga and Ngudjolo*, TC II, 22 January 2010, para. 60, as well as Appeals Chamber, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled “Decision on the Modalities of Victim Participation at Trial”, ICC-01/04-01/07-2288, 16 July 2010 (Judgment of the Appeals Chamber of 16 July 2010).

victim-participants at the trial stage of the process.⁵⁰⁴ In addition, the Trial Chamber also admitted the testimony of three individuals participating in the proceedings as victims.⁵⁰⁵

Similar situation developed in the *Katanga and Ngudjolo* case, where two individuals had already been interviewed as prosecution witnesses before being granted victim standing at the pre-trial stage of the case.⁵⁰⁶ Subsequently, at the trial stage of proceedings four victim-participants were authorized to give testimony.⁵⁰⁷ The Trial Chamber contemplated the different scenarios of acquiring victim-witness status by noting that ‘neither the Statute nor the Rules prohibit victim status from being granted to a person who already has the status of a prosecution or defence witness.’⁵⁰⁸ At the same time, with respect to the possibility of a victim-participant to appear subsequently also as a witness in the proceedings, the Chamber advanced the apposite observation that ‘[s]imilarly, rule 85 of the Rules does not prohibit a person who has been granted the status of victim from subsequently giving evidence on behalf of one of the parties.’⁵⁰⁹

The combination of the standing of victim with the capacity of witness in proceedings entails a number of intriguing issues of both legal and practical nature. An essential legal matter which merits particular attention concerns the evidentiary character of the information that emanates from individuals with dual victim-witness status. The issue arises as to which information provided by victim-witnesses in their oral or written statements and/or submissions in the course of the proceedings represent piece(s) of evidence. For that purpose, the subsequent paragraphs will explore the manifold matters related to the character of the information provided by dual status individuals in: applications for participation as victim-participants; written statements given in the capacity of a witness; views and concerns expressed in the course of the proceedings; oral statements given as a witness, *i.e.* testimony. Next, attention will be drawn to other equally important issues which are intrinsically linked to those outlined above, namely, the admissibility and the probative value of the testimony of dual status individuals; the

⁵⁰⁴ *Lubanga*, TC I, Decision of 18 January 2008 and Decision of 15 December 2008.

⁵⁰⁵ *Lubanga*, TC I, 9 July 2009.

⁵⁰⁶ Prosecution witnesses 166 and 168 were later granted the status of victim-participant at the pre-trial stage of the case.

⁵⁰⁷ *Katanga and Ngudjolo*, TC II, Décision aux fins d’autorisation de comparution des victimes a/0381/09, a/0018/09, a/0191/08 et pan/0363/09 agissant au nom de a/0363/09, ICC-01/04-01/07-2517, 9 November 2010.

⁵⁰⁸ *Katanga and Ngudjolo*, TC II, 22 January 2010, para. 110.

⁵⁰⁹ *Ibid.* (reference omitted).

impact (if any) of a dual status individual's false or incorrect testimony on his or her standing as victim-participant.

5. Juxtaposition Between Victims' Applications for Participation and Written Witness Statements

At the outset, in order to properly disentangle the issues enumerated above, one must juxtapose the procedural character of a victim's application for participation with the procedural character of the statements made by the same person in a witness capacity. In drawing such a comparison recourse should be made to the different purpose and confines of the involvement of victims in proceedings and the participation as a witness. By contrast to victims who take part in the ICC's proceedings upon their own choice and initiative, and in their own interest, witnesses participate only as long as they are approached by the criminal justice authorities for the purpose of their testimony.⁵¹⁰ Thus, unlike the independent standing of victims as participants throughout all stages of the judicial process, the participation of witnesses serves exclusively the establishment of the truth and is limited to giving testimony at some stage of the criminal justice process.

The comparison between a victim's application for participation and a witness statement discerns a number of distinctions. The two differ in terms of: 1) the initiative upon which each has been made; 2) the interests and the purpose that each of them serves; 3) the context in which each is being submitted and processed.

First, the choice whether to file an application for participation depends exclusively on the victim-applicant. By contrast, witness statements are given upon the request of the criminal justice authorities. Secondly, while an application for participation serves the interests of the applicant to be admitted as victim-participant in proceedings, witness statements serve exclusively the interest in the ascertainment of the truth. Accordingly, witness statements are provided for the sake of the interests of justice rather than in the witness's own personal interest. Thirdly, the legal regime governing the submission of victims' applications for participation is delineated in a separate set of provisions distinct from the regime governing the deposition of witness statements. The application forms for participation are filled in and filed within the context of the

⁵¹⁰ See article 64(6)(b) and rule 65.

application procedure set forth in rule 89, whereas witness statements are given in the context of the fact-finding process conducted by the criminal justice authority in charge of the respective stage of proceedings (the Prosecutor or the relevant Chamber). Accordingly, witness statements are collected in the course of the evidence-gathering process for the purpose of the illumination of facts and circumstances under examination. As such, they are pieces of oral evidence and form part of the evidentiary material. On the contrary, the information in the victims' applications for participation serves to demonstrate whether the applicant is eligible for participation as enunciated in rule 85 and article 68(3). Thus, the information provided by the victim-applicant serves to substantiate the application so as to warrant the admission of the person by the Chamber as victim-participant. The purpose of the information provided by victim-applicants is to enable the Chamber to ascertain whether the incident(s) described in the application form fall(s) within the factual scope of the case to be examined by the Chamber.⁵¹¹ In addition, by contrast to the information given in a witness capacity, the information in the victim's application form does not in itself prove the facts alleged by the applicant or any other circumstances under consideration. Hence, rather than representing statements of an evidentiary nature, the contents of the application form assert facts without actually proving them.

In that sense the application form resembles to some extent the document containing the charges prepared by the prosecuting authority. Both allege that a harmful behaviour has occurred within a certain time period and territory. The document containing the charges serves the initiation of proceedings against the alleged perpetrator for the purpose of bringing him or her to trial, just as the application for participation is intended to warrant participation in proceedings. Accordingly, akin to the information contained in a victim's application form, the information presented in the document containing the charges is not evidence in itself, but an allegation. Whether the asserted events and harm have taken place as described, as well as whether the alleged harmful behaviour is attributable to the person identified in the charges is subject to examination and proof in the course of the criminal justice process. In other words, as bluntly put by

⁵¹¹ *Ruto et al.*, PTC II, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/09-01/11-249, 5 August 2011, para. 46.

the ICJ in the *Bosnia* case, ‘the claims made by the Prosecutor in the indictments are just that – allegations made by one party.’⁵¹²

Notwithstanding the similarities between the document containing the charges and the application for victim’s participation, the two are far from being identical. Unlike the Prosecutor who by virtue of regulation 52(c) of the Regulations of the Court must also include legal characterisation of the facts alleged in the document containing the charges, victim-applicants are not required to legally characterise the facts described in their applications for participation. This distinction stems from the different procedural standing and mission pursued by the prosecuting authority at trial. By contrast to the prosecution, victims participate in proceedings in their own right and in the pursuit of their own personal interests. Victim-applicants before the ICC are neither auxiliary prosecutors, nor are they obliged to support the prosecution.⁵¹³ Victims’ interests do not necessarily coincide with those of the Prosecutor acting in the public interest.⁵¹⁴ In addition, victims apply for participation in a personal, not in a professional capacity. Consequently, they are neither expected to have legal background nor to provide proper legal characterization of the facts asserted in their applications for participation. For the same reasons, victim-applicants are not required to identify the alleged perpetrators in their applications for participation. According to the Court’s consistent jurisprudence, the identification of the perpetrators is not among the information necessary for the applications to be considered complete.⁵¹⁵

Since the information contained in victims’ applications for participation is not of an evidentiary character and, accordingly, does not form part of the evidentiary material, it would be logical to assume that disclosure-related issues in that respect should not at all arise. As the regime governing disclosure refers to ‘evidence’ in the Prosecutor’s possession or control, information of a non-evidentiary character falls outside its purview.

⁵¹² See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, para. 217.

⁵¹³ See e.g. *Bemba*, TC III, Decision on Directions for the Conduct of the Proceedings, ICC-01/05-01/08-1023, 19 November 2010, para. 17 *et seq.*, where it is observed that victims are participants rather than parties to the trial and shall not be considered as a support to the Prosecutor, as well as that they have a unique role, separate from that of the parties and that their participation can assist the Chamber in its determination of the truth.

⁵¹⁴ See along the same lines, de Hemptinne, *supra* note 390, where it is observed that unlike the Prosecutor who must act as an agent of justice representing the public interest, victims intervene in a private capacity and their motivation is purely personal.

⁵¹⁵ See *Ruto et. al.*, PTC II, 05 August 2011, para. 22, plus footnotes 26 and 27. See also *Bemba*, TC III, 12 July 2010, para. 94, where the Chamber has observed that the identification of the actual perpetrators by victim-applicants would, first, be at times impossible and, secondly, would place an unfair burden on victim-applicants.

Still, as the review of the ICC's jurisprudence shows, initially some Chambers have favoured the disclosure of information provided by victims in their applications for participation.

In this regard, in the *Lubanga* case, following an application by the defence, TC I concurred without demur with the view of the Prosecutor that the applications for participation of dual status individuals should be considered in the same way as statements of witnesses, and that they are covered by rule 76(1).⁵¹⁶ Lacking any thorough consideration of the specific nature of a victim's application for participation, the Chamber ruled that the Prosecutor must apply 'the same approach to this material as [...] to any other exculpatory material in [the Prosecutor's] possession', subject to the lack of any objections on the part of the dual status individuals' representatives. The Chamber subsequently reiterated its stance in an oral decision on the familiarization process, where it observed that 'these application forms should be treated by the Office of the Prosecutor in exactly the same way as all other [a]rticle 67(2) and [r]ule 77 material. They should be looked at to see whether they contain evidence or other material which comes under [...] that statutory provision or that rule.' This approach was later sustained by TC III, which on the basis of the concurring views of the parties ruled that the applications for participation by dual status individuals shall be treated as 'prior witness statements',⁵¹⁷ and left to the discretion of the Prosecutor to determine whether the application forms of dual status individuals should be disclosed.⁵¹⁸

The judicial findings of the two Trial Chambers call for a critical consideration as they fall short of discerning the stark difference between the legal character of an application for participation and a witness statement which has already been contemplated above. Furthermore, the interpretation of both article 67(2) and rules 76-77 which envision 'evidence' in the Prosecutor's possession or control warrants the conclusion that victims' applications are not subject to disclosure from the Prosecutor to the defence. In

⁵¹⁶ See the oral decision of TC I in the *Lubanga* case on the familiarisation process, referred to by the Prosecution in its 'Prosecution Response to the Defence Observations on the Modalities of Victim Participation at the Trial Stage', ICC-01/04-01/07-877-tENG, para. 24, where the Chamber observed that 'we've set out a procedure whereby the representative of the relevant victim applicant should be consulted to see whether there are objections to disclosure taking place in relation to those portions that have been identified. If disclosure is to take place with redactions, the proposed redactions need to be brought to the attention of the Bench, because it is for us to decide whether or not redactions are appropriate and accord with the interests of justice and, in particular, the accused's rights to a fair trial.'

⁵¹⁷ *Bemba*, TC III, 12 July 2010, para. 55 *et seq.*

⁵¹⁸ *Ibid.*, para. 59.

this respect it is worth recalling that, unlike witness statements and other evidentiary material, the applications for participation of dual status individuals are not gathered by the Prosecutor in the course of his or her investigation, but are submitted to the Chamber within the application procedure set forth in article 68(3) read together with rule 89. Hence, the sole authority in possession and control of the applications for participation is the relevant Chamber and not the Prosecutor. The parties by virtue of rule 89(1) are provided with copies of the application forms for the limited purpose of making, if they so wish, observations as regards the eligibility of the applicants as victim-participants according to rule 85 read together with article 68(3). Consequently, the ruling that victims' applications for participation should be treated as prior witness statements lacks legal basis.

At the same time, although the application form does not in itself contain evidentiary material and thus is not subject to disclosure, its contents may serve as the basis for the collection of information by the Prosecutor. Information collected on the basis of a victim's application may subsequently be used as evidence in the proceedings and, to the extent to which it may contain exculpatory information or may be material for the preparation of the defence, would be subject to disclosure pursuant to article 67(2) and rules 76-77.

A similar line of reasoning has been espoused in the *Ruto et al.* case where the Pre-Trial Chamber has been seized with a defence's request for transmission of unredacted victims' applications to the Prosecutor in order for him to fulfil his disclosure obligations pursuant to article 67(2).⁵¹⁹ By contrast to TC II and TC III, the Pre-Trial Chamber ruled that 'the information provided by the applicants in their applications for participation can under no circumstances be considered as evidence' by observing that 'such information has been provided by the applicants to the Chamber only for the purposes of substantiating an application for participation but not to give evidence on either points of fact or law in the present case.' Hence, in addition to the emphasis on the distinct purpose of the application for participation, the Chamber endorsed the non-evidentiary character of the information contained therein. This conclusion was premised on the observation that the information in the applications for participation 'was not collected by the Prosecutor

⁵¹⁹ *Ruto et al.*, PTC II, Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case, ICC-01/09-01/11-169, 8 July 2011 (*Ruto et al.*, PTC II, 8 July 2011), para. 9, as well as *Ruto et al.*, PTC II, 5 August 2011, para. 107.

during his investigation and cannot therefore be defined as “evidence”. Eventually, the Chamber asserted that the information provided by the victim-applicants in the applications for participation is not subject to disclosure between the parties ‘even if information provided therein can be considered exonerating in nature’. Still, the Pre-Trial Chamber reasonably noted that the information contained in the application forms, albeit lacking evidentiary character, could indicate to the Prosecutor that ‘the applicants may possess information to be considered exculpatory within the meaning of article 67(2), in which case the Prosecutor’s investigation should extend to cover such information.’⁵²⁰ Worth noting is the pertinent clarification made by the Chamber that ‘only in case information in the victims’ possession is *collected by the Prosecutor* and reveals itself as exculpatory in nature and/or in any way material for the preparation of the defence, the Prosecutor will be under the statutory obligation to disclose to the Defence any such evidence [emphasis added].’⁵²¹

6. Juxtaposition Between Victims’ Views and Concerns and Testimony

Following the examination of the procedural character of victims’ applications for participation, a comparison should be drawn between the procedural character of submissions made by dual status individuals in their capacity as victims, *i.e.* by way of the presentation of views and concerns, and in their witness capacity, *i.e.* by way of giving testimony. This issue is intrinsically linked to the question regarding the position and the role of victims in the evidence-gathering process, which is the subject of consideration of the next chapter. In addition, bearing in mind that the notion ‘views and concerns’ has been addressed in detail in the context of the prerequisites of article 68(3), the present section will be confined to suggesting a parallel between the purpose and substance of the views and concerns of dual status individuals and their testimony.

As mentioned earlier in relation to article 68(3), the possibility for victims to present their views and concerns in the course of the proceedings is separate and distinct from the possibility of a dual status individual to give testimony. Through the presentation of views and concerns victims convey their stance and/or preoccupation(s) with respect to (a) particular issue(s) which arise(s) in the course of the proceedings and has a bearing on

⁵²⁰ *Ruto et al*, PTC II, 8 July 2011, para. 11.

⁵²¹ *Ibid.*

victims' personal interests. Accordingly, in this way victims express their opinion on matters that arise throughout the criminal justice process and impact the development and conduct of proceedings. Said differently, through their views and concerns victims communicate their feelings to the decision-maker.⁵²² Likewise, by way of presenting their views and concerns victim-participants may draw the attention of the Chamber to pending issues, such as the approach to be taken to reparations.⁵²³ Still, it is to be recalled that, albeit victims' views and concerns may affect the correct evaluation by the Chamber of facts relevant to the case (for instance, by pointing to local traditions and customs),⁵²⁴ they do not themselves form part of the evidentiary material.

Testimony, on its part, serves the ascertainment of facts under consideration. By way of his or her testimony, the individual communicates to the criminal justice authorities his or her own personal experience, knowledge and recollections of facts comprised by the subject-matter of the case. Testimony is thus a narrative concerning events that have occurred before the initiation of the criminal justice process. Consequently, testifying individuals do not voice an opinion with respect to issues pending throughout the proceedings, but provide a statement of facts relating to past events. That is to say, the witness gives 'testimony only about matters of which the witness has personal knowledge.'⁵²⁵ Accordingly, by contrast to victims' views and concerns, the testimony of a victim given in accordance with article 69(1) represents a piece of oral evidence and as such forms part of the evidentiary material.

It thus follows that, albeit having the potential to enhance the Court's better understanding of the case at hand, the views and concerns of victims expressed in the course of the proceedings do not *per se* prove or disprove the facts under consideration. By contrast, through their account given in the form of a testimony dual status individuals place evidentiary material before the Court. As a consequence, by way of testifying individuals with combined victim-witness status could impact directly the ascertainment of the subject-matter of proceedings.

⁵²² Edwards, *supra* note 448, p. 976.

⁵²³ *Lubanga*, TC I, Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, ICC-01/04-01/06-2032-Anx, 26 June 2009 (*Lubanga*, TC I, 26 June 2009), para. 40.

⁵²⁴ For instance, the local traditions were considered to influence the manner of giving testimony – at times witnesses were speaking in first name as if they had personally experienced the events, although this was not the case.

⁵²⁵ Dennis, *supra* note 486, p. 491.

The ‘critical distinction’⁵²⁶ between a dual status individual’s views and concerns and his or her testimony has been articulated in a consistent and unanimous way by the Court. In the *Lubanga* case, as regards the request of three victims to appear in person at trial in order to express their views and concerns and to present evidence by way of their testimony, the Court made the pertinent emphasis on the distinct procedural character of the process of victims ‘expressing their views and concerns’ as opposed to ‘giving evidence’.⁵²⁷ Accordingly, the Court held that in order for the victims to incorporate their statements into the trial evidence, such statements must take the form of a testimony. In other words, in order to directly impact the evidentiary material, victims must ‘give evidence under oath from the witness box.’⁵²⁸ Consequently, in addition to their victim standing the victims must assume the status of a witness.⁵²⁹ In fact, this situation reflects the first scenario, contemplated above, of acquiring duality of status, whereby an individual is first accorded the status of victim-participant and subsequently is called to testify.

This approach was further reiterated in the *Abu Garda* case. During the confirmation of charges hearing PTC I emphasised that the presence at the seat of the Court of the dual status individual concerned was ‘in his capacity as a witness, not as a victim authorised to participate in the proceedings.’⁵³⁰

The distinct nature of a victim’s views and concerns and a witness testimony was likewise emphasized in the *Bemba* case. While the Chamber authorized the personal appearance of three victims for the purpose of expressing their views and concerns *via* video link, during the hearing the Presiding Judge repeatedly reminded the parties and the participants that the views and concerns are not part of the evidentiary material and that, accordingly, through the expression of their views and concerns the victims would not provide evidence. For this reason, the victims who presented their views and concerns in person did not make a solemn undertaking envisaged in rule 66 as to the truthfulness of their statements. The victim-participants were neither questioned by the parties nor by the Chamber. The legal representative was allowed a limited intervention in the course of the

⁵²⁶ *Lubanga*, TC I, 26 June 2009, para. 25.

⁵²⁷ *Ibid.*

⁵²⁸ *Ibid.*

⁵²⁹ *Ibid.*

⁵³⁰ *Abu Garda*, PTC I, Confirmation of charges hearing, Transcript, ICC-02/05-02/09-T-13-ENG ET WT, 20 October 2009, pp. 95-96.

hearing aimed at facilitating the victims in the presentation of their views and concerns.⁵³¹ Thus, in contrast to the three victims who assumed duality of status by giving testimony in the *Lubanga* trial, the three victims in the *Bemba* trial did not become dual status individuals. The latter shared their plight before the Court without, however, submitting evidentiary material by way of their statements.

A brief comparative glance beyond the ICC reveals that the distinct procedural character of a victim's views and concerns as compared to testimony has likewise been acknowledged by other judicial institutions at the international level. At the ECCC, where civil parties (unlike 'simple' witnesses) do not take an oath when questioned, they are granted the opportunity to make a statement at the conclusion of their testimony pertaining to their suffering.⁵³² Notwithstanding the lack of a formal distinction in the legal framework between civil parties' views and concerns and testimony, the jurisprudence of the Court has at all time distinguished between testimony on the facts at issue and a general statement of suffering, which civil parties can freely make at the end of their interview.⁵³³ In this respect, as posited by the Trial Chamber in Case 002,⁵³⁴ the civil party's testimony is subject to adversarial argument, while the statement of suffering of the same individual is not. In light of this clarification and given rule 87(2) of ECCC's Internal Rules, according to which only evidence put before the Chamber and subject to examination forms part of the evidentiary material, it follows that civil parties' statements of suffering do not represent evidence.⁵³⁵ Accordingly, akin to the views and concerns of ICC's victims expressed in the course of the proceedings, the statements of suffering of civil parties at the ECCC do not form part of the evidentiary material.⁵³⁶

⁵³¹ *Bemba*, TC III, Transcript of open session hearing, ICC-01/05-01/08-T-227-Red-ENG CT WT, 25 June 2012, p. 2, at lines 11-18.

⁵³² See *The Prosecutor v. Nuon Chea and Khieu Samphan*, Case File Dossier No. 002/19-09-2007/ECCC/TC (ECCC, Case 002), Decision on Request to Recall Civil Party Tccp-187, for Review of Procedure Concerning Civil Parties' Statements on Suffering and Related Motions and Responses (E240, E240/1, E250, E250/1, E267, E267/1 and E267/2) of 2 May 2013 (ECCC, Case 002, Decision of 2 May 2013).

⁵³³ *Ibid.*

⁵³⁴ *The Prosecutor v. Nuon Chea and Khieu Samphan*, Case File Dossier No. 002/19-09-2007/ECCC/TC.

⁵³⁵ See further in the same vein the analysis suggested by Mélanie Vianney-Liaud, 'Civil Parties' Statements of Suffering at the ECCC', <http://destinationjustice.org/civil-parties-statements-of-suffering-at-the-eccc/>, p. 3.

⁵³⁶ Another essential clarification advanced in the ECCC's jurisprudence is that a civil party's statements of suffering neither could become a pretext for the introduction of new facts by the civil party nor for the advancement of allegations against the accused that have not been subject to adversarial argument. Accordingly, where a statement of suffering would introduce new factual allegations, particularly if inculpatory, an opportunity for adversarial challenge would be given to the defendant. See ECCC, Case 002, Decision of 2 May 2013, para. 19.

Another judicial institution which has also made an apposite distinction between an opinion expressed by a witness and the testimony of that witness is the ICJ.⁵³⁷ The Court has not treated as evidence ‘any part of the [witness] testimony [...] which was not a statement of fact, but a mere expression of opinion as to the probability or otherwise of the existence of such facts, not directly known to the witness.’ The Court further opined that ‘[t]estimony of this kind, which may be highly subjective, cannot take the place of evidence.’ The Court reached the reasonable conclusion that ‘[a]n opinion expressed by a witness is a mere personal and subjective evaluation of a possibility, which has yet to be shown to correspond to a fact; it may, in conjunction with other material, assist the Court in determining a question of fact, but is not proof in itself.’⁵³⁸

7. Admissibility and Probative Weight of the Testimony of Dual Status Individuals

In light of the parallel between the procedural character of victims’ views and concerns and victims’ testimony a thorough examination of the manifold intriguing aspects of the testimony of dual status individuals as an evidentiary material proves apposite. The concurrent participation as a victim and as a witness in the same proceedings entails a variety of issues related to the admissibility and the probative weight of the testimony of dual status persons, some of which have been addressed in the legal literature,⁵³⁹ as well as in practice.⁵⁴⁰

Before proceeding with the issue at stake, a few preliminary words on the substance of the core evidentiary concepts employed in the present section are to be briefly sketched at this point. Evidence must, first and foremost, be relevant in order to form part of the evidentiary material. As eloquently described by scholars in the field of evidence law, this means that the evidence at hand ‘must relate to some fact which is a

⁵³⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, p. 14 (ICJ, Nicaragua case, Judgment on the Merits), para. 68.

⁵³⁸ *Ibid.*

⁵³⁹ Observers raise the question whether victims would lose the possibility to be questioned by the Prosecutor or whether the evidence they provide by way of their testimony would be of lesser weight – see Victims’ Rights Working Group, *Victim Participation at the International Criminal Court. Summary of Issues and Recommendations*, November 2013, p. 11.

⁵⁴⁰ See in this respect the objections of the defence against the dual status of witness 166 at trial addressed in *Katanga and Ngudjolo*, PTC I, 23 June 2008, para. 13 *et seq.* due to the witness’s access to the confidential part of the case file.

proper object of proof in the proceedings.’⁵⁴¹ Closely related to the concept of ‘relevance’ is the term ‘admissibility’. The latter denotes the quality of the evidence, namely, that it must be ‘properly [...] received by a court as a matter of law’.⁵⁴² Logic dictates that irrelevant evidence is always inadmissible. However, the opposite scenario is not necessarily true. There may be instances where not all evidence that is relevant would also be admissible. The legislature may limit or prohibit the reception of certain types of evidence, notwithstanding their relevance.⁵⁴³ Next, evidence that is both relevant and admissible is subject to evaluation by the decision-maker with respect to its probative weight. Thus, as duly observed in the recent Judgment on the appeal of Thomas Lubanga against his conviction, ‘[w]hile the Statute and the Rules of Procedure and Evidence do not specifically refer to [the] concepts [of the credibility of the witness and the reliability of his or her testimony], they are part of the evaluation of evidence required of a Trial Chamber by article 74 (2) of the Statu[t]e.’⁵⁴⁴ Consequently, when evaluating the weight of the oral evidence at hand, the trier of fact must assess meticulously its credibility and reliability.⁵⁴⁵

As noted both in literature⁵⁴⁶ and in practice,⁵⁴⁷ these two concepts, albeit being intrinsically connected, are not interchangeable. In determining whether the testimony is credible the judicial authority will consider ‘the extent to which the witness can be accepted as giving truthful evidence in the sense of honest or sincere testimony.’⁵⁴⁸ When evaluating the reliability of the witness testimony, the Court will appraise ‘the truthfulness of [the] testimony in the sense of its accuracy.’⁵⁴⁹ It thus follows that the notion ‘credibility’ relates to the truthfulness of the testimony, while the notion ‘reliability’

⁵⁴¹ Dennis, *supra* note 486, p. 5 and the corresponding footnote, where it is observed that the ‘facts which are the proper objects of proof are [...] called material facts’.

⁵⁴² *Ibid.*

⁵⁴³ See, in general, *ibid.* and the examples provided by the author in that respect.

⁵⁴⁴ Lubanga, Appeals Chamber, Public Redacted Version of the Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, 1 December 2014 (Lubanga, Appeals Chamber Judgment of 1 December 2014), para. 239.

⁵⁴⁵ See Dennis, *supra* note 486, p. 6.

⁵⁴⁶ See also in the same vein the note provided by Lynne Marek in the *National Law Journal*, September 21, 2009 (available online) describing an instance where federal Prosecutors in Chicago have requested a U.S. District Judge for reconsideration of a ruling on false testimony with the contention that the testimony at issue was actually ‘truthful, but inaccurate’.

⁵⁴⁷ See Lubanga, Appeals Chamber Judgment of 1 December 2014, para. 239, where the Chamber noted ‘a strong link between the two concepts [of credibility and reliability]’ and clarified that ‘while credibility is generally understood as referring to whether a witness is testifying truthfully, the reliability of the facts testified to by the witness may be confirmed or put in doubt by other evidence or the surrounding circumstances [footnotes omitted].’

⁵⁴⁸ See Dennis, *supra* note 486, p. 6.

⁵⁴⁹ *Ibid.* As the author correctly notes, honest witnesses may sometimes give evidence that is inaccurate.

relates to its accuracy. Consequently, ‘although a witness may be honest, and therefore credible, the evidence he or she gives may nonetheless be unreliable because, *inter alia*, it relates to facts that occurred a long time ago or due to the “vagaries of human perception” [footnote omitted].’⁵⁵⁰

As far as the testimony of individuals with combined victim-witness status is concerned, this type of evidence, just like any other testimony which is part of the trial evidence, is subject to judicial assessment as regards its relevance and admissibility and, eventually, its trustworthiness.⁵⁵¹ In light of the considerations concerning duality of status posited hitherto, it is logical to conclude that the mere fact that an individual appears in one and the same case in the capacity of a witness and a victim does not *per se* render his or her testimony inadmissible or unreliable. The admissibility and the probative value of the testimony of dual status individuals, akin to any other piece of evidence collected in the course of the proceedings, should be determined on a case-by-case basis against the backdrop of the circumstances of the case in accordance with article 69(4). This logic is further premised on the rationale of rule 63(2), which envisions that the Chamber shall assess freely all evidence submitted in order to determine its relevance and admissibility in accordance with article 69. In the same vein is rule 64(3), pursuant to which the Chamber shall not consider evidence that it has ruled irrelevant or inadmissible. Consequently, the legal framework does not determine in advance the relevance or admissibility of any evidence. Instead, quite wisely, this task has been entrusted by the drafters to the discretion of the trier of fact.

In addition, it would be equally wrong to presume that dual status individuals have a material interest in the conviction of the accused. First, as noted at the very outset, the participation in proceedings leading to the adjudication of the individual criminal responsibility of the alleged offender does not in itself entail an interest of victims in safeguarding future claims for reparations. Participation in proceedings on the merits of the criminal case and participation in reparation proceedings following a conviction are two separate and distinct possibilities accorded to victims by the ICC’s statutory instruments which may be employed independently of one another.⁵⁵² Secondly, the

⁵⁵⁰ *Lubanga*, Appeals Chamber Judgment of 1 December 2014, para. 239.

⁵⁵¹ Article 69(4) and (7) and article 74.

⁵⁵² The independent character of proceedings on the merits and reparation proceedings has also been endorsed in the Court’s jurisprudence. *See e.g.* the recent jurisprudence of the Appeals Chamber in *Lubanga*, where it is observed that ‘a request for reparations pursuant to rule 94 of the Rules of Procedure and Evidence is not

widely acknowledged interest of victims in the establishment of the truth would be safeguarded only when the actual perpetrator is brought to justice.⁵⁵³

Hence, the testimony of dual status individuals should not be presumed partial by default. Rather, its accuracy and credibility or the lack of such are to be assessed on a case-by-case basis against the backdrop of the totality of the evidence collected in the course of the proceedings as provided for in article 74. In accordance with this norm, when evaluating the evidence given by the dual status individual by way of his or her testimony the Chamber shall determine whether this piece of evidence corresponds with other evidence gathered at trial or, rather, remains isolated. For instance, consideration should be given to the fact whether the previous testimony (if any) of the dual status individual is consistent with the testimony given at trial, as well as whether the account given by that person is corroborated by other pieces of evidence. This appraisal, however, can be undertaken after the completion of the evidence-gathering process in light of the totality of the evidentiary material collected in the course of the proceedings.⁵⁵⁴ Accordingly, the probative value of the testimony of dual status individuals should be assessed by the Court case by case on the basis of a scrutinized analysis of whether and to what extent the version of the facts conveyed by the dual status individual comports with the rest of the evidence. Hence, the reliability and the credibility of the testimony of the dual status individual, as is the case with any other type and piece of evidence, depends on the extent to which it is substantiated by evidence of a different nature or obtained from other sources.

Logic in the same vein permeates the ICC's jurisprudence and is also reflected in the case-law of the ECCC. In this respect, the ICC has acknowledged the lack of any prohibition or limitation in the Court's founding texts of the admissibility or probative value of the evidence of individuals with combined victim-witness status.⁵⁵⁵ The Court

dependent upon either the filing of an application for participation pursuant to rule 89 of the Rules of Procedure and Evidence or being granted the right to participate in the proceedings in relation to the accused person's guilt or innocence or the sentence.' – *Lubanga*, Decision of the Appeals Chamber of 14 December 2012, para. 69. The ECCC has also observed that at the ICC 'a civil action is not a prerequisite for victim participation in [...] proceedings' – see ECCC, Case 001, Trial Chamber Decision of 9 October 2009, para. 38.

⁵⁵³ See along these lines, Ashworth, *supra* note 213, who contends that no one and certainly not the victims of crime has a defensible interest in the conviction of innocent people.

⁵⁵⁴ The logical understanding that the evidentiary material gathered in the course of the proceedings must be evaluated in its totality is also embraced in the relevant jurisprudence. See e.g. *Lubanga*, Appeals Chamber Judgment of 1 December 2014, para. 22, footnote 16 referring to similar findings of the ICTY in the *Mrkšić and Šljivan anin* Appeal Judgment, para. 217.

⁵⁵⁵ *Katanga and Ngudjolo*, PTC I, 23 June 2008, paras. 19 and 24.

noted that ‘the crucial factor in assessing the reliability [and the credibility] of ... [dual status individuals’] oral statements or testimonies’ would lie in the fact whether there were substantial differences between the statements of victim-witnesses given before they had access to other evidence in the case record and their statements after they had had access to the other evidence in the case record.⁵⁵⁶ Further, the Court has observed that a uniform predetermination of the admissibility or the probative value of dual status individuals would deprive the truth-finding authority from potentially ‘highly relevant and probative testimony of witnesses for the sole reason that they have also been authorised to participate in the proceedings as victims.’⁵⁵⁷ In support of its understanding the Court has also drawn on the experience of national jurisdictions, which, it noted, lack ‘any rule automatically reducing the probative value of the evidence given by [...] individuals holding [...] dual status.’⁵⁵⁸ At the same time, it has been duly noted that if substantial doubts would arise as to the credibility of the testimony of a particular dual status individual, on the basis of a case-by-case assessment the Chamber may eventually decide not to admit that specific victim to the witness’s stand.⁵⁵⁹

Similarly, as already mentioned, the ECCC’s Chambers are also in favour of the case-by-case assessment of the credibility and probative value of the civil parties’ statements. The Chambers have asserted that the weight to be given to civil party testimony should be assessed in light of the credibility of that testimony.⁵⁶⁰ Consequently, neither the ICC, nor the ECCC attach a lesser or a greater weight to any piece of oral evidence whether provided by victim-participants/civil parties or by ‘simple’ witnesses.

The same understanding should likewise apply to the testimony of dual status individuals who prior to their examination have been given access to the evidence

⁵⁵⁶ *Katanga and Ngudjolo*, PTC I, 23 June 2008, para. 27(i) and (ii).

⁵⁵⁷ *Katanga and Ngudjolo*, TC II, 22 January 2010, para. 88.

⁵⁵⁸ *Katanga and Ngudjolo*, PTC I, 23 June 2008, para. 26.

⁵⁵⁹ See in more detail, *Katanga and Ngudjolo*, TC II, Décision relative au maintien du statut de victime participant à la procédure des victimes a/0381/09 et a/0363/09 et à la demande de Me Nsita Luvengika en vue d’être autorisé à mettre fin à son mandat de Représentant légal desdites victimes, ICC-01/04-01/07-3064, 7 July 2011 (reclassified as public on 16 August 2011), para. 42 *et seq.* The Chamber found that the testimony of one victim who had been authorized to give testimony at trial would not be conducive to the ascertainment of the truth due to considerable doubts in her credibility. The Chamber decided not to allow the testimony of that dual status individual on the basis of a scrutinized consideration of the submissions of the victim’s legal representative, who himself had seriously questioned the veracity of the account of his client.

⁵⁶⁰ ECCC, Case 002, Decision of 2 May 2013, para. 22. See also para. 11 referring to the observations of the Co-Prosecutors as being in the same vein. The Prosecution submitted that the probative value of civil party’s testimony should be assessed by the Trial Chamber in accordance with the same standards as that of witnesses and not accorded lesser weight/value merely because civil parties’ testimony is not given under oath. The Prosecution further submitted that the testimony of a civil party should not be considered to possess an inherently lesser value merely because it was not given under oath.

contained in the record of the case, including the statements of other witnesses. Arguments in support of this understanding could be drawn on the rationale behind rule 140(3), second sentence. According to this norm, the fact that a witness has heard the testimony of another witness (which may affect and/or influence the accuracy of his or her recollections), shall not in itself warrant the witness's disqualification from testifying. Instead of ruling out the testimony altogether, the fact that the victim-witness is examined after having heard the testimony of (an)other witness(es) shall be noted in the record and considered by the Chamber when evaluating the evidence.⁵⁶¹

Provisions to the same effect are to be found in the legal frameworks of other international(ized) criminal justice fora, such as the SCSL, the STL and the *ad hoc* tribunals for the former Yugoslavia and Rwanda. In this strain, rule 90(D) of SCSL's Rules stipulates that even if a witness has heard the testimony of another witness before testifying, the witness shall not for that reason alone be disqualified. The same viewpoint is almost verbatim reflected in rule 150(C) of STL's Rules, as well as in rule 90(C) and rule 90(D) of the Rules of the ICTY and ICTR, accordingly.

As to the ECCC, although its framework does not contain an explicit provision akin to the ones just mentioned, rule 84(3) of the Internal Rules provides for the possibility of each party to request the Chamber to hear any witness present in the courtroom who was not properly summoned to testify. As the wording of the provision suggests, such witnesses would already be present in the courtroom, thus, by implication, they would have heard the testimony of the witnesses who had testified before them at trial. Hence, it is reasonable to conclude that rule 84(3) of ECCC's Internal Rules reflects the same rationale. Accordingly, also at the Cambodian tribunal the fact that a witness has heard the testimony of other witnesses would not render such testimony inadmissible.

By the same token, witnesses at the ECCC that are in a relationship with a party are not disqualified from testifying for that sole reason.⁵⁶² The reliability of the testimony of such individuals, as the testimony of any other witness, is to be appraised by the trier of

⁵⁶¹ In a similar fashion, the defence in *Lubanga* argued that the Chamber should apply to dual status individuals the same system that applies to witnesses who are not participating as victims, treating their testimony in the same way – see *Lubanga*, TC I, Decision on certain practicalities regarding individuals who have the dual status of witness and victim, ICC-01/04-01/06-1379, 5 June 2008 (Decision of 5 June 2008), para. 20.

⁵⁶² See rule 24(2) and (3) of the Internal Rules. According to rule 24(3) of the Internal Rules, before testifying each witness shall be asked by the judicial authority whether he or she is in a relationship with either party – the charged person/the accused or a civil party. Witnesses in a relationship with a party are, however, not disqualified from testifying for that sole reason. Instead, as stipulated by rule 24(2) of the Internal Rules, such witnesses shall be questioned without having taken an oath.

fact against the backdrop of the totality of the evidence gathered at trial. The only instance where a testimony would be rendered outright inadmissible, as envisaged in rule 24(4) of the Internal Rules, is where there is evidence of criminal responsibility of the witness in question.

Interestingly, by contrast to the rest of the institutions pointed out above, the ICJ has explicitly regarded two forms of testimony as being *prima facie* of superior credibility. The first is ‘the evidence of a disinterested witness[, that is,] one who is not a party to the proceedings and stands to gain or lose nothing from its outcome’. The second testimony identified by the Court as *prima facie* of superior credibility is ‘so much of the evidence of a party as is against its own interest’.⁵⁶³ Accordingly, said findings distinguish between two types of testimony: testimony of disinterested witnesses and testimony of partial witnesses. Nevertheless, the ICJ did not regard the testimony of a partial witness as inadmissible or unreliable by default, but simply admonished that it would ‘treat such evidence with great reserve’.⁵⁶⁴ Similarly, the Court did not rule out other pieces of evidence, such as affidavits produced for the purposes of litigation, albeit it held that they would be treated ‘with caution’.⁵⁶⁵ In the view of the Court, it would not be inappropriate to receive such affidavits (although it would treat them with caution), as long as these pieces of evidence attested to personal knowledge of facts by a particular individual.⁵⁶⁶

All the above speaks in favour of the case-by-case appraisal of the probative weight and trustworthiness of any piece of oral evidence, irrespective of whether it is provided by a dual status individual or by a ‘simple’ witness, by a disinterested or by a partial witness.

An additional argument against the uniform predetermination of the probative value or credibility of a victim’s account of relevant facts emanates from a jurisdiction which expressly prohibits duality of victim-witness status. In Romania, where victims are parties to the proceedings, they cannot be heard as witnesses.⁵⁶⁷ Nevertheless, the statements of the victim participating as a party to the case are not necessarily deprived of

⁵⁶³ ICJ, *Nicaragua* case, Judgment on the Merits, para. 69.

⁵⁶⁴ *Ibid.*, para. 70.

⁵⁶⁵ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659, para. 244.

⁵⁶⁶ *Ibid.*

⁵⁶⁷ According to article 82 of the Criminal Procedure Code of Romania, the harmed person may be heard as witness if he doesn’t constitute him- or herself as civil party and will not take part in the trial as victim.

any probative weight.⁵⁶⁸ Instructive in this regard is article 75 of the Criminal Procedure Code, according to which, although the statements of the victim or the civil party given at trial do not represent evidence on their own, they may nevertheless lead to the truth to the extent to which they are corroborated by all the evidence in the case. Accordingly, to the extent to which the statements of the person assuming victim standing are in line with the evidentiary material, they may be taken into consideration by the trier of fact in its determination of the subject-matter of the case. Hence, although not formally constituting evidence, following a case-by-case evaluation, the statements of the victim may nevertheless serve as ‘relevant material’.

Lastly, in the broader context of the admissibility, probative weight and trustworthiness of oral evidence in general the following should also be taken into consideration. Although due to his or her unique standing in the criminal justice process the accused could be presumed partial by default, still, some common law jurisdictions explicitly allow the simultaneous appearance of the accused as a witness,⁵⁶⁹ whereas others (mainly continental systems) provide for unsworn statements to be made on the part of the accused.⁵⁷⁰ The nature of such unsworn statements is twofold.⁵⁷¹ First, the unsworn statements of the accused serve his or her defence and thus the law does not require an undertaking as to their truthfulness.⁵⁷² At the same time, unsworn statements form part of the evidentiary material provided that they contain (as a whole or in part)

⁵⁶⁸ By virtue of articles 76 and 77 the hearing of the victim as a party and the civil party is conducted pursuant to the provisions concerning the hearing of the defendant.

⁵⁶⁹ See e.g. section 17(2) of the Evidence Act 2008 of Australia, according to which the defendant is not competent to give evidence as a witness for the prosecution, thus, *a contrario*, is a competent defence witness. See to the same effect, section 53(4) read together with section 53(1) of the Youth Justice and Criminal Evidence Act 1999, UK. At the same time, however, once the accused decides to take the witness’s stand, he or she can subsequently be cross-examined by the Prosecutor in said jurisdictions. The accused is a competent witness pursuant to rule 608 read together with rule 601 of the Federal Rules of Evidence of the USA.

⁵⁷⁰ The possibility for the accused to make an unsworn oral or written statement in his or her defence (*i.e.* a statement without a solemn declaration(oath)) is characteristic of continental systems and is not completely unfamiliar on the international criminal justice scene. This practice, which existed back at Nuremberg, is nowadays statutorily provided for by article 67(1)(h) of the Rome Statute (alongside with the concurrent possibility to testify under oath, *i.e.*, to take the witness stand). Before the entry into force of the Rome Statute the possibility for an accused to make an unsworn statement was introduced at the ICTY by virtue of rule 84*bis* of the Rules of Procedure and Evidence (adopted 2 July 1999).

⁵⁷¹ See § 164. (1) of the Criminal Procedure Code of Austria (*Strafprozeßordnung* 1975), which makes an explicit proviso regarding the twofold nature of the statements of the accused (*Vernehmung des Beschuldigten*): ‘[...] Der Beschuldigte ist auch darauf aufmerksam zu machen, dass *seine Aussage seiner Verteidigung dienen, aber auch als Beweis gegen ihn Verwendung finden könne* [emphasis added]’.

⁵⁷² For instance, section 60(2) of the Criminal Procedure Code of Germany makes a prohibition of oath with respect to suspected persons; likewise, articles 103 and 105 of the Criminal Procedure Code of France expressly distinguish between the status of a witness and that of a suspect and provide for an oath of truthfulness as applicable solely to witnesses.

information relevant to the case.⁵⁷³ Thus, in criminal justice systems which accommodate the possibility for the accused to make an unsworn statement, such statements do not have a pre-determined evidentiary weight. Instead, their probative value is evaluated by the Court case by case on the basis of a scrutinized analysis of whether and to what extent the version of the facts as conveyed by the accused is corroborated by other evidence. The credibility of the accused's unsworn statement, as is the case with any other type and piece of evidence, depends on the extent to which it is substantiated by the rest of the evidentiary material.⁵⁷⁴

To conclude, the extent to which the trier of fact would take into consideration the testimony of any witness, who could be considered partial due to the fact that he or she assumes another parallel standing in proceedings, such as of a victim-participant, a civil party or an accused would depend on its consistency with the rest of the evidentiary material. Hence, eventually the probative weight of such pieces of evidence would be assessed case-by-case by the Court in light of the totality of the evidence gathered in the course of the proceedings.

8. Impact of an Inconsistent Testimony Provided by a Dual Status Individual on that Person's Victim Standing

Another question that emanates from the present topic is whether the individual's victim standing could be affected on account of the evidence given in his or her capacity as a witness. This issue, akin to the trustworthiness of the testimony of dual status individuals, can neither be pre-determined nor resolved in the abstract, but should be assessed on a witness-by-witness basis.

Depending on the circumstances, the following two scenarios could unfold. If, albeit inconsistent, the testimony of the dual status individual would not cast doubt on the information which had substantiated his or her eligibility as a victim in proceedings (*i.e.* his or her identity, the harm suffered, the causal link between the harm and the crime(s) under consideration), the victim's standing would not be affected. Conversely, a testimony disproving or contradicting information which had previously warranted the

⁵⁷³ For instance, article 114 *et seq.* of the Criminal Procedure Code of Bulgaria explicitly designate the accused's statements as evidentiary material.

⁵⁷⁴ See in more detail on this issue, Schabas and Bachvarova, *supra* note 301.

acknowledgement of victim status would invalidate the basis upon which the assessment of rule 85 was conducted and which, accordingly, had justified the judicial authorisation of that person's victim standing in proceedings.

This matter has arisen in the *Lubanga* trial where each of the two scenarios of acquiring duality of status took place. As noted at the beginning of the present chapter, six witnesses who had been interviewed by the Prosecutor in the course of the investigation were subsequently granted the right to partake as victims in proceedings⁵⁷⁵ and three victims were authorised to give evidence at trial by way of a testimony in accordance with the requisites of article 68(3) and 69(3).⁵⁷⁶

In the judgment on the merits, the Chamber, following its evaluation of the evidence and the entire proceedings pursuant to article 74, divided its findings concerning individuals who assumed the standing of victim together with that of a witness in two different sections.⁵⁷⁷ With respect to two out of three victims who testified at trial in accordance with article 69(3) read together with article 68(3), the majority of the Chamber noted 'significant weaknesses' as regards the evidence these two individuals gave and the 'internal inconsistencies [that their testimonies contained] which undermine[d] their credibility.'⁵⁷⁸ The Trial Chamber concluded that two of the three victim-witnesses 'at the instigation or with the encouragement' of the third victim-witness 'stole' the identities of others in order to benefit from participating in the proceedings at hand. Ultimately, against the backdrop of the 'material doubts' concerning the identities of the two victims who testified, the Chamber concluded that 'its original prima facie evaluation [of the victim status of the three individuals] was incorrect' which required that the Chamber amend any earlier order as to their participation, to the extent necessary.

With regard to the rest of the dual status individuals upon consideration of the totality of the evidence collected in the course of the proceedings the Chamber noted that the inconsistencies in their personal accounts related not only to facts germane to the

⁵⁷⁵ By virtue of the Decision on the applications by victims to participate in the proceedings of 15 December 2008.

⁵⁷⁶ By virtue of the Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, ICC-01/04-01/06-2032, 9 July 2009.

⁵⁷⁷ Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012 (*Lubanga* Trial Judgment). The judicial findings with respect to dual status individuals who had been granted victim status after having been interviewed by the Prosecutor as witnesses were incorporated in paras. 484 *et seq.* and paras. 1362 *et seq.* of the Judgment, while the findings related to the victims who were subsequently admitted as witnesses before the Court were developed in para. 499 *et seq.*

⁵⁷⁸ *Lubanga* Trial Judgment, para. 502.

criminal responsibility of the alleged offender, but also to facts such as the harm allegedly sustained and the casual link between the alleged harm and the crimes under consideration.⁵⁷⁹ Subsequently, the Chamber, by majority, found that given the doubts to the honesty, reliability and accuracy of the individuals with combined status it would be ‘unsustainable to allow victims to continue participating if a more detailed understanding of the evidence has demonstrated they no longer meet the relevant criteria’.⁵⁸⁰ As a consequence of its findings, the majority of the Chamber determined that the victim status of all nine dual status individuals must be withdrawn.

The partially dissenting Judge contended in favour of the preservation of the individuals’ victim standing, notwithstanding their contradictory testimonies. In the view of the dissenting Judge, although the testimonies of the dual status individuals due to inconsistencies, contradictions and weaknesses should not be used for determining the individual criminal responsibility of the accused, they should not affect the individuals’ status as victim-participants in proceedings.⁵⁸¹ The dissenting Judge averred that ‘it [would be] unfair and discriminatory to impose upon individuals with dual status a higher evidentiary threshold [...] as regards their victims’ status, while all other victims participating in the proceedings have not been subject to thorough examination by the parties and the Chamber [...]’.⁵⁸²

The contention of the dissenting Judge reflects the general understanding that dual status individuals should not be placed at a more (un)favourable position as compared to persons who are only victim-participants in proceedings.⁵⁸³ However, the arguments in the dissent neglect the fact that the purpose of the examination of dual status individuals in their witness capacity, like the examination of persons who are only witnesses, is not to further substantiate, validate or verify their standing as victims in proceedings. Instead, the purpose of the testimony of dual status individuals when appearing as witnesses is to contribute to the ascertainment of the truth through their personal account of the events under consideration. Hence, when participating in proceedings as witnesses, dual status

⁵⁷⁹ In particular, controversies arose with respect to the wounds inflicted upon some of the dual status individuals, as well as with respect to the recruitment of dual status individuals - some of whom contended that this occurred outside the temporal scope of the charges.

⁵⁸⁰ *Lubanga* Trial Judgment, para. 484.

⁵⁸¹ Separate and dissenting opinion of Judge Odio Benito to the *Lubanga* Trial Judgment (Dissent to the *Lubanga* Trial Judgment), para. 25 *et seq.*

⁵⁸² Dissent to the *Lubanga* Trial Judgment, para. 35.

⁵⁸³ See in the same spirit the Decision of 5 June 2008 which discussed certain practicalities regarding dual status individuals.

individuals are treated as any other witness and, therefore, are neither subjected to an additional review as regards their victim status, nor are they imposed any higher evidentiary threshold concerning their eligibility as victims. Nevertheless, indubitably, the testimony of persons with combined status would by implication also touch upon facts germane to their victim standing, such as their identity, the type of the harm suffered, the manner in which it was inflicted as a result of the commission of the crime(s) under consideration, etc. (but beyond that the two distinct standings should not be confused). Therefore, if the testimony of dual status individuals would contradict or distort the information which formed the basis of the Chamber's rule 85 assessment, it would be contrary to the truth-finding mission of criminal justice as well as to the due process rights of the parties if the judicial authority would simply ignore this newly obtained information. Consequently, if the Chamber would conclude that had the newly produced information been available at the time of its *prima facie* evaluation of the rule 85 criteria it would not have substantiated an acknowledgement of victim status, the participation of the respective victim would no longer be warranted.

Notwithstanding the vociferous caveats against withdrawal of victim status that followed the decision of the Trial Chamber,⁵⁸⁴ such a course of action would neither be contrary to the letter nor to the spirit of the ICC's legal framework. Instructive in this regard is rule 91(1), which explicitly envisions the possibility for a Chamber to modify a previous ruling under rule 89, that is, its initial judicial determination of a victim status.⁵⁸⁵ Furthermore, as the review of the relevant case-law attests, this instance of withdrawal of victim status was not the first to have taken place in proceedings before the ICC.

A similar scenario unfolded at the trial stage in the *Katanga and Ngudjolo* case where serious doubts were raised with respect to the veracity of the accounts provided by two victim-participants for the purpose of their admission in proceedings.⁵⁸⁶ In light of the newly obtained information and on the basis of rule 91(1), the Chamber amended its

⁵⁸⁴ *Lubanga*, 'Request for reconsideration of Trial Chamber I's decision to withdraw the status of participating victims in the proceedings to a/0047/06, a/0048/06, a/0050/06 and a/0052/06', 23 March 2012, ICC-01/04-01/06-2845 (*Lubanga*, Request for reconsideration).

⁵⁸⁵ See in the same vein, *Katanga and Ngudjolo*, TC II, 7 July 2011, para. 25 referring to the Registry's observations in this respect, namely that 'in light of the information provided by the Legal Representative of the two victims, the Chamber may modify its previous ruling and rule anew on their victim status.' (reference omitted).

⁵⁸⁶ The concerns were raised by the then victims' legal representative who himself had reason to doubt in the credibility of his clients, as well as in the veracity of their accounts which had formed the basis of their acknowledgement of victim status.

previous ruling and revoked the victim standing of the two individuals.⁵⁸⁷ By contrast to the situation in the *Lubanga* case, where the victim standing was repealed following the examination of the individuals as witnesses, the Chamber in the *Katanga and Ngudjolo* case withdrew its authorization allowing the appearance of the two victims for the purpose of testifying and revoked, accordingly, their victim standing.

A swift comparative glance detects the existence of similar approaches at both the international and domestic levels. At the STL, the Court has observed that the recognition of victim status at the pre-trial phase of the case is without prejudice to a subsequent determination in a final judgment whether an individual who has been granted the status of victim-participant on the basis of *prima facie* evidence is or is not a victim of an attack falling within the Court's jurisdiction.⁵⁸⁸ In a similar fashion, the ECCC has revoked the civil party standing of several individuals after noting that sufficient doubt had been raised with respect to their victim standing.⁵⁸⁹ Notable in this respect is the fact that in their submissions to the Supreme Court Chamber the civil party appellants themselves, as noted by the Chamber, did not submit 'that the Trial Chamber may never revoke civil party status once granted.' Rather, the civil party appellants merely averred that 'once recognized by the Chamber as [c]ivil [p]arties, this status should remain unless specific and identifiable evidence is presented that casts doubt on the status [reference omitted].'⁵⁹⁰

At the domestic level, an analogous scenario is reflected, for instance, in the Criminal Procedure Code of Moldova. Pursuant to the relevant provisions, the criminal justice body will cease the participation of a damaged party at the respective procedural stage if the alleged damages which had warranted the recognition of the person as a damaged party are not substantiated.⁵⁹¹ In the same vein if, following the recognition of a person as a civil party, it is established that there are no grounds for granting civil party status, the criminal justice body in charge of the proceedings will suspend the

⁵⁸⁷ See *Katanga and Ngudjolo*, TC II, 7 July 2011, para. 49: 'Accordingly, in light of all of the information currently available to it, the Chamber considers, pursuant to rule 91(1) of the Rules, which provides that a chamber may modify a previous ruling under rule 89, that it must amend the part of the Decision of 31 July 2009 granting a/0381/09 and a/0363/09 the status of victim participating in the proceedings, and hence decides to revoke their standing.'

⁵⁸⁸ *Ayyash et al.*, Decision on Victims' Participation in the Proceedings, 8 May 2012, para. 3.

⁵⁸⁹ See ECCC, Case 001, Trial Judgment, 26 July 2010, as well as ECCC, Case 001, Appeal Judgment of 3 February 2012, in particular, para. 649: 'Although [the defendant] did not dispute this Civil Party application, the Chamber nevertheless cannot uphold it [due to the lack of sufficient evidence establishing kinship or bonds of affection between the direct victim and the civil party admitted to participate alleging harm based on the arrest and execution of a direct victim]'. See further on this issue Stover *at al.*, *supra* note 2.

⁵⁹⁰ ECCC, Case 001, Appeal Judgment of 3 February 2012, para. 452.

⁵⁹¹ Article 59(3) of the Criminal Procedure Code.

participation of that person as a civil party in the case.⁵⁹² Hence, as a consequence, the participation of the damaged party is suspended.

9. Consequences of a Withdrawal of Victim Standing. Possible Remedies

The withdrawal of victim status entails the question of the remedy, if any, available to an individual whose status of victim-participant has been revoked.⁵⁹³ The Court's legal framework is silent on both the withdrawal of victim status as well as on whether a victim could challenge the relevant judicial ruling in such a case. Attention to the lack of a possibility for challenging the revocation of the standing of victim-participant has been drawn by the Office of Public Counsel for Victims in its request to the Trial Chamber for reconsideration of its decision on withdrawal.⁵⁹⁴ The request was rejected by the Chamber as unwarranted and without any legal basis.⁵⁹⁵

Notwithstanding the silence of the constitutive instruments on the issue at stake, in the event of a withdrawal of victim status the last sentence of rule 89(2) together with regulation 86 of the Regulations of the Court could be invoked by analogy. Pursuant to rule 89(2), a victim whose application has been rejected may file a new application later in the proceedings. Regulation 86 of the Regulations of the Court provides the possibility for the filing of an application at the appeals stage of proceedings. On the basis of these provisions the inference could be advanced that, if the first instance judgment is appealed by either party, the person whose victim status has been withdrawn at the trial stage of proceedings could file a new application for participation at the appeals stage of the case.

⁵⁹² Article 61(3) of the Criminal Procedure Code.

⁵⁹³ See in the same vein www.internationaljusticeproject.com/2012/04/24/lessons-learned-from-the-lubanga-trial-what-it-means-for-victims-the-development-of-the-icc-legal-aid-system.

⁵⁹⁴ See *Lubanga*, Request for reconsideration, para 10.

⁵⁹⁵ *Lubanga*, TC I, Order refusing a request for reconsideration, ICC-01/04-01/06-2846, 27 March 2012.

10. Practical Matters Occasioned by the Participation of Dual Status Individuals⁵⁹⁶

Besides the legal issues contemplated hitherto, the concurrent participation both as a victim and as a witness in the proceedings may intensify concerns related to the well-being, security and protection of dual status individuals. It thus becomes apparent that duality of status engenders a variety of issues having important practical implications related to: the responsibilities of the Court and its organs as regards the security and protection of dual status individuals; the exchange of information in relation to individuals with dual status; the way dual status individuals should be contacted by the parties, their legal representative(s) and the Court's organs; the way communications regarding dual status individuals among the Court's organs should take place.

These issues arose for the first time in the *Lubanga* case⁵⁹⁷ as the first ICC case to go to trial.⁵⁹⁸ Therefore, the first Chamber to ponder on the matters just mentioned is TC I. The subsequent section will draw particular attention to the Trial Chamber's decision of 5 June 2008 as the first decision especially dedicated to dual status individuals. As such, this decision has addressed a number of matters which the combination of the two procedural capacities occasions in practice. It is worth noting that the relevant judicial findings have been sustained in the subsequent ICC's jurisprudence⁵⁹⁹ and also find reflection in the jurisprudence of the STL in its consideration of the phenomenon of duality of status.⁶⁰⁰

⁵⁹⁶ A previous draft of this section forms part of the following publication by the PhD candidate: 'The International Criminal Court 2006-2008. Commentary on 'Witnesses'', in *Annotated Leading Cases of International Criminal Tribunals*, Andre Klip and Steven Freeland (eds.), Intersentia, 2014, pp. 366-390.

⁵⁹⁷ See *Lubanga*, TC I, 18 January 2008, paras. 103 *et seq.*, para. 132, as well as the Decision of 5 June 2008.

⁵⁹⁸ See *Lubanga* Trial Judgment; Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901, 10 July 2012; Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, 7 August 2012. At the time of writing all three decisions are the subject of pending proceedings on appeal.

⁵⁹⁹ See *e.g. Katanga and Ngudjolo*, TC II, Decision on a number of procedural issues raised by the Registry, ICC-01/04-01/07-1134, 14 May 2009.

⁶⁰⁰ See *Ayyash et al.*, Decision of the Pre-Trial Judge of 18 May 2012, para. 61, which explicitly refers to the findings of the ICC's Trial Chamber in the *Lubanga* case and the need of tailored protective measures as regards dual status individuals, acknowledged in said jurisprudence.

10.1. Role of the Registry and its Sections as Regards the Protection of Dual Status Individuals

Certainly, among the most pressing concerns with respect to victims and witnesses in a criminal trial are issues related to their security and protection. Consequently, a number of legal texts of the Court's constitutive instruments contemplate the respective responsibilities of the different ICC's organs. The Court's statutory documents acknowledge the primary functions of the Registry and its units in this regard. The Registry is entrusted with a variety of tasks and responsibilities aimed at ensuring the protection and security of victims and witnesses. Among the primary responsibilities of the Registry in this respect are the duty: to provide in consultation with the Office of the Prosecutor protective measures and security arrangements and other appropriate assistance;⁶⁰¹ to consult the Chamber on protective measures sought upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim;⁶⁰² to make an assessment, pending decision by the Chamber, whether disclosing information contained in a victim's application may jeopardise his or her safety and security;⁶⁰³ to formulate long- and short-term plans for protection;⁶⁰⁴ to maintain and assess admission of witnesses to the ICC protection programme.⁶⁰⁵

Logically, the legal regime governing the security and protection of victims and witnesses is likewise applicable to the security and protection of individuals with combined victim-witness status. Still, the combination of these two legal standings in the one and the same case occasions in practice questions that are not addressed explicitly by the legal framework. One such issue concerns, for instance, the manner in which the different organs of the Court, parties and participants could contact dual status individuals, especially victim-witnesses included in the ICC's protection programme, without putting their security at risk.

In its decision on dual status individuals of 5 June 2008 Trial Chamber I acknowledged the Registry's primary duty of assisting witnesses and victims as far as their security and protection is concerned, as well as its obligation to consult the organs of

⁶⁰¹ Article 43(6).

⁶⁰² Rule 87.

⁶⁰³ Regulation 99(1) of the Regulations of the Registry.

⁶⁰⁴ Rule 17.

⁶⁰⁵ Regulation 96 of the Regulations of the Registry.

the Court on protective measures.⁶⁰⁶ In conformity with this understanding based on the relevant normative framework, the Chamber ruled that all contact between a dual status individual included in the ICC's protection programme, *i.e.* a protected individual, and the organs of the Court, the parties and the participants shall be facilitated by the Victims and Witnesses Unit ('the VWU'). Similarly, in line with the VWU's primary responsibility re protected individuals, the Chamber stressed that the unit is not obliged to disclose to a party or to a participant details of contact with such individuals.⁶⁰⁷ The risk-assessment duty of the VWU, as entrusted by the statutory documents, has also been reflected accordingly and enhanced through the instructions of the Chamber that the unit should be made aware of the dual status of protected individuals.⁶⁰⁸ In the same vein, in order to enable the Victims Participation and Reparations Section ('the VPRS') to properly perform its duties as regards participating victims, the Chamber endorsed the recommendations advanced by the Registry that the VPRS should be made aware by the VWU whether a person with dual status is in the protection programme so that the contact between the VPRS and that individual be facilitated.⁶⁰⁹

10.2. Exchange of Information Concerning Dual Status Individuals

Another important matter regarding dual status individuals which has arisen in practice concerns the exchange of information on individuals with dual status. First and foremost, an emphasis should be made to the importance of the legal representatives' awareness of their clients' combined status so as to ensure that the rights of victims would not be compromised or put at risk by their witness standing.

Again, the first Chamber to contemplate this issue was TC I. The Chamber invited the Registry, the parties and participants to discuss and suggest possible avenues of

⁶⁰⁶ The primary functions of the Registry and its units with regard to witnesses and/or victims (and, as appropriate, other persons on account of witness's testimony) as stipulated by the legal framework are: to provide in consultation with the Office of the Prosecutor protective measures and security arrangements and other appropriate assistance (article 43(6) of the Rome Statute); to consult the Chamber on protective measures (rule 87); to formulate long- and short-term plans for protection (rule 17); to maintain and assess admission of witnesses to the ICC protection programme (regulation 96 of the Regulations of the Registry); to ensure the confidentiality of communications relating to specific victims within the Court; to make an assessment, pending Decision by the Chamber, whether disclosing information contained in an application from a victim may jeopardise his or her safety and security (regulation 99(1) of the Regulations of the Registry).

⁶⁰⁷ *Lubanga*, Decision of 5 June 2008, paras. 53b. and 53c.

⁶⁰⁸ *Ibid.*, para. 53d.

⁶⁰⁹ *Ibid.*, para. 75.

exchange of information concerning dual status individuals.⁶¹⁰ The mechanism of communication eventually endorsed by the Chamber on the basis of the submissions received merits a brief consideration. Two alternative mechanisms of exchange of information were approved aimed at enabling the victims' legal representative(s) to request and obtain information as regards dual status individuals: an '*inter partes*'⁶¹¹ mechanism and an alternative procedure envisaging exchange of information through the Chamber.⁶¹²

The order in which the two alternative mechanisms have been introduced suggests that the communication between the legal representative(s) and each of the parties is to be preferred to communication through the Chamber. Although this understanding has not been explicitly reflected by the Court, logic dictates that the direct communication between the parties and the legal representative(s) concerning dual status individuals would facilitate and expedite the conduct of proceedings. Moreover, the involvement of the Chamber on issues not contested by the parties and the participants which neither require judicial resolution nor judicial sanction may lead to undue overloading of the Chamber and may ultimately delay the proceedings.

Furthermore, the '*inter partes*' mechanism of communication which is to be initiated and take place without the involvement of the Chamber reflects the principal responsibility of the legal representative(s) in securing their clients' interests. This understanding is eloquently manifested in the communication mechanism between the legal representative and the Prosecutor.⁶¹³ Indicative in this regard are the concurrent

⁶¹⁰ *Lubanga*, TC I, 18 January 2008, para. 138(h).

⁶¹¹ Since neither victims, nor their legal representative(s) are parties to the proceedings, the reference to the '*inter partes*' mechanism is in inverted commas. This mechanism of communication takes place without the involvement of the Chamber between the legal representative(s) and the parties: communication with the Prosecutor (para. 55 of the decision) and communication with the defence (para. 57 of the decision).

⁶¹² *Lubanga*, Decision of 5 June 2008, para. 56a which sets forth the procedure through an application by the legal representative(s) to the Chamber.

⁶¹³ The communication mechanism with the Prosecutor could be summarised as follows. When the legal representative(s) become aware that their client may have dual status they should provide the Prosecutor with that person's individualizing information. The plain wording of this ruling implies that information of any kind and from any source would suffice for the legal representative(s) to initiate a communication with the Prosecutor in order to verify its correctness. The decision further prescribes that the Prosecutor, on his or her part, should check whether the individual has dual status, as well as whether he or she is in the ICC protection programme and should communicate this to the legal representative(s). In addition, it is provided that in the communication back to the legal representative(s) the Prosecutor should also verify whether he or she intends to make an application for protective measures pursuant to rules 87 and 88. Admittedly, this stipulation is in tune with the duty cast upon the Prosecutor by articles 54(3)(f) and 68(1), and rules 87-88 to take or to request security and protective measures related to witnesses, victims and other persons at risk, subject to the primary authority of the Chamber. This condition appears, however, somewhat superfluous, since the last two paragraphs of the decision

requirements governing the communication between the legal representative(s) and the Prosecutor, provided for by the Chamber.⁶¹⁴ The solicitor-client relationship, envisioned as one of the requirements, guarantees that the person contacting the Prosecutor on behalf of the dual status individual is authorised to represent him or her and, accordingly, to communicate and to receive information concerning that individual. The solicitor-client relationship is also an essential safeguard for the individual concerned which stems from the responsibilities of the legal representative(s) provided in the Code of Professional Conduct for counsel.⁶¹⁵ In addition, the confidentiality proviso is an emanation of counsel's duty to respect the professional secrecy and confidentiality, as enshrined in, *inter alia*, article 8 of the Code of Professional Conduct for counsel. Finally, the consent of the dual status individual would ensure that the identifying information would be disclosed between the legal representative(s) and the Prosecutor upon the knowledge of that person. This standpoint emanates from the principled idea throughout the ICC's legal framework that the will of the individual concerned should be taken into consideration by the relevant authority whenever the issue of his or her well-being, safety or protection arises.

At the same time, the analysis of the communication between the legal representative(s) and the defence, as agreed upon by the parties and the participants and affirmed by the Chamber, is prone to criticism.⁶¹⁶ The perusal of the relevant judicial findings suggests that the mere fact that the identity of the dual status individual is already known to the defence would suffice in the view of the Chamber (as well as in the views of the parties and participants) for the individual's identifying information to be communicated to the defence. However, this ruling neglects the fact that the defence's awareness of the victim's identity does not automatically presuppose that this person is a (potential) defence witness. The identity of a victim may be known to the defence for a variety of reasons. Therefore, regardless of the parties' and the participants' agreement on

(paras. 77 and 78) similarly instruct that the legal representative(s) should be notified of the parties' intention to refer a dual status individual to the ICC protection programme. *See* para. 55d of the decision.

⁶¹⁴ These requirements are as follows: there should be a solicitor-client relationship between the individual and the legal representative(s); all communications must be confidential; there should be a consent of the individual to the legal representative(s) that his or her identity be disclosed to the Prosecutor.

⁶¹⁵ ICC-ASP/4/Res.1.

⁶¹⁶ This communication procedure is much more simplified than the communication with the Prosecutor. According to the decision, if the identity of the victim is known to the defence in advance, the legal representative(s) should communicate to the latter the name of their client. In its communication back to the legal representative(s) the defence should inform if the name provided is of a potential defence witness.

the procedure to be followed, the Chamber should not have approved it without demur. Indubitably, it is the Court that bears the utmost responsibility for the protection of individuals whose safety could be at stake in the proceedings. As a consequence, the disclosure of any identifying information to the defence, in particular the fact that the individual concerned participates as a victim in the proceedings, should have been made contingent on the consent of that person, akin to the express stipulation in that respect within the communication mechanism between the legal representative and the Prosecutor.

The alternative procedure envisioning the exchange of information on dual status individuals through the Chamber represents an adroit example of the utmost authority of the Chamber in charge of the proceedings with respect to a person's safety and security. Accordingly, if the exchange of information as regards victim-witnesses takes place through the Chamber the protective functions of the judicial authority take precedence over the respective duties of the legal representative(s) in securing the safety of the individuals concerned.

10.3. Contact Between Dual Status Individuals, the Parties and Other Participants

The analysis of the two procedures of communication of information concerning dual status individuals endorsed in practice provides an important indication of the fact that the safety of persons with (potential) dual status represents a matter of utmost priority. The exchange of information concerning dual status individuals entails another equally essential practical matter. The question arises as to the way in which the parties and other participants could approach dual status individuals without posing any risks to the safety and well-being of the latter. As the jurisprudence of the Court manifests, the safety of dual status individuals is a key concern also when contact between such persons and the parties, participants and the organs of the Court is being considered.

Consequently, in order to ensure that contact between dual status individuals and the parties does not take place at the expense of that person's security or well-being the Chamber in charge of the proceedings should introduce appropriate safeguards.

This logic imbues the approach adopted in practice. Acknowledging the legal representatives' primary responsibility for guaranteeing the safety of their clients, the Court conditioned the contact with a dual status individual initiated by either party on prior notice by the party to the person's legal representative(s).⁶¹⁷ Another essential judicial ruling in that respect is the endorsement of the leading role of the VWU in facilitating contact between the parties, participants and dual status individuals.

The central role of the VWU was similarly acknowledged by the Chamber in the context of the opposite scenario, according to which a person with dual status would be the one requesting contact with the parties or other participants. That the Chamber discussed such a scenario is somewhat surprising given the fact that neither witnesses, nor victims, nor, accordingly, dual status individuals are parties to the proceedings. Therefore, the reasons which, in the view of the Chamber, may warrant a request by dual status individuals to approach on their own initiative a party or another participant remain rather elusive. Be that as it may, what is important to note is that the Chamber once again reiterated its principled understanding about the central role of the VWU in the communication between dual status individuals, parties and other participants.

Also on previous occasions the Trial Chamber in the *Lubanga* case had embraced the view that, as a matter of principle, contacts between the parties, participants and witnesses should take place through the VWU.⁶¹⁸ This standpoint has subsequently been adopted by other Chambers. Throughout its jurisprudence the Court has recognized the role of the VWU as the relevant disinterested body of the Court to facilitate contacts between the parties, participants and dual status individuals and ruled that the Unit should have a representative present at the meeting(s).⁶¹⁹ This stipulation provides an eloquent illustration of the important role entrusted to the VWU during the interview of victims and witnesses, namely of being in charge of arranging and facilitating the relevant interviews.

Also essential to note is the requirement envisioned by the Court for the presence of a representative of the VWU during the interview. The latter would, indubitably,

⁶¹⁷ *Lubanga*, TC I, Decision of 5 June 2008, para. 59a.

⁶¹⁸ *Lubanga*, TC I, Decision on the Prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses, ICC-01/04-01/06-1372, 3 June 2008, para. 11 and 14; *Lubanga*, TC I, Decision of 5 June 2008, para 59b.

⁶¹⁹ See e.g. *Bemba*, TC III, Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants, ICC-01/05-01/08-699, 22 February 2010; *Abu Garda*, PTC I, Confirmation of charges hearing, Transcript, ICC-02/05-02/09-T-13-ENG, 20 October 2009, pp. 95-96.

guarantee that the interview is conducted in an objective way with due regard for the well-being of the dual status individual. Logically, the primary purpose of the presence of the VWU's representative as a neutral organ of the Court with specific protective functions would serve to ensure the respect for the safety and well-being of the victim-witness during the contact with the opposite party.

In addition, the core role of the VWU has also been recognized in the context of communications with dual status individuals that are without legal representation. Instructive in this respect are the relevant findings of TC I, according to which whenever the VPRS would need to contact an unrepresented victim-witness, the VWU should be responsible for informing the section as to whether that person is in the ICC's protection programme. As correctly observed, the issue of communication between the two units of the Registry is essentially an internal Registry issue and, thus, should be resolved by the latter.

Notably, the Court did not condition the contact of the VPRS with protected individuals upon the consent of the party who referred the person to the ICC's protection programme. Though not expressly articulated, this judicial ruling is an acknowledgement of the core function of the VWU and VPRS as the Registry's units called upon to serve and safeguard the interests of victims (*i.e.* victim-applicants, victim-participants, as well as dual status individuals), including, but not limited to their protection, safety and well-being in the broadest sense of the word. Hence, the communication between the VWU and the VPRS should facilitate contact between the VPRS and protected individuals rather than put them at risk. In the same spirit and for the purpose of protecting and ensuring the well-being of dual status individuals, the correct view was endorsed that the VWU and the VPRS shall neither reveal the identity of that person to the parties (if the victim has requested so), nor the fact that he or she is included in the ICC's protection programme and has dual status.

In view of the above, the discussion of duality of status attests to a myriad of complex matters of both legal and practical nature that the simultaneous participation of victims as witnesses called to testify brings to the fore. As will be seen shortly, similarly complex and intriguing proves the part played by victims of their own accord in the process of gathering evidence at the ICC.

CHAPTER FIVE

Victims and Evidence

The procedural phenomenon of duality of victim-witness status and its potential to contribute to the evidentiary material represents only one aspect of the multifaceted issue concerning the place and the role of victims in the evidence-gathering process. The present chapter will explore in turn the extent and the manner in which participating victims may intervene and, eventually, impact the ICC's evidence-gathering process on their own will and initiative. The issue which calls for a thorough consideration concerns the extent to which victim-participants may engage at the fact-finding stage of the case, the stage where the processing of evidence unfolds.⁶²⁰

The processing of evidence comprises the submission and the examination of evidence alike and represents, in essence, the nucleus of the criminal justice process. Consequently, the fact-finding process determines the outcome of the case at hand. The latter is adjudicated upon a scrutinized evaluation and analysis of the evidentiary material gathered in the course of the proceedings.

At the outset, worth recalling is the multilayered procedural architecture and the unique mandate of the ICC, which, besides participation in proceedings on the merits of the criminal case also affords victims the possibility to claim reparations. Thus, the sections to follow will contemplate the corresponding standing and roles of the Prosecutor and the defence, of the Chamber and of victim-participants in the submission and, respectively, in the examination of evidence on the merits, as well as in the developing of evidence pertinent to reparations.

1. The Role of the Parties and of the Chamber in the Processing of Evidence on the Merits of the Criminal Case

Before embarking on the analysis of the place and the role of victims in the evidence-gathering process on the merits, some general remarks on the processing of evidence at the ICC prove exigent. The perusal of the core statutory provisions on evidence at the case

⁶²⁰ Damaska, *supra* note 501, p. 1090.

stage of proceedings – article 69(3) read in conjunction with article 64 - lends support to the conclusion that the proof-gathering style before the ICC is both party-driven and judge-controlled.⁶²¹ Article 69(3) is an excellent example of the blending of legal ideas characteristic of the two traditional criminal justice paradigms existing in a domestic setting.⁶²² As already mentioned in passing during the analysis of duality of status, this norm accommodates both the common law and the continental models of developing evidence. While the first evidence-gathering style is being portrayed as partisan⁶²³ or ‘hands-off’,⁶²⁴ the latter proof-gathering method is referred to as official⁶²⁵ or ‘hands-on’.⁶²⁶ In this strain commentators have observed that ‘terms like cross-examination and other typical terms of art (“catch words”) for either common or civil law are conspicuously absent from the Statute and the Rules [...] [since the] [d]rafters wanted to make clear that what is sought is really a mixed procedure.’⁶²⁷

The first sentence of article 69(3) reflects the adversarial (partisan) approach, which is a hallmark of common law jurisdictions. Pursuant to this procedural model, the collection of evidence is left to the discretion and to the initiative of the parties, *i.e.* the Prosecutor and the defence, as adversaries on the criminal justice arena. Accordingly, pursuant to the adversarial proof-taking style, the judicial intervention is more limited in comparison to the non-adversary fact-finding paradigm prevalent in continental systems of adjudication. In other words, as duly noted in the relevant literature, ‘the common law model places the task of producing evidence entirely upon the parties, with no obligation for the judges to seek additional forms of evidence to sustain their factual and legal findings.’⁶²⁸

At the same time, the second sentence of article 69(3) introduces a concurrent, judicially pro-active mechanism of developing evidence designed to ensure the completeness of the factual and evidentiary material collected in the course of the

⁶²¹ McGonigle, *supra* note 362, p. 107.

⁶²² See the juxtaposition suggested by Damaska, *supra* note 501.

⁶²³ Mirjan Damaska, ‘Of Hearsay and its Analogues’, *Minnesota Law Review*, vol. 76 (1992), p. 425-458.

⁶²⁴ Claus Kress, ‘The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise’, *Journal of International Criminal Justice* 1 (2003), pp. 603-617, p. 604.

⁶²⁵ Damaska, *supra* note 501.

⁶²⁶ Kress, *supra* note 624.

⁶²⁷ Kai Ambos, ‘International criminal procedure: “adversarial”, “inquisitorial” or mixed?’, *International Criminal Law Review*, vol. 3 (2003), pp. 1-37, p. 20.

⁶²⁸ Riddell and Plant, *supra* note 481, p. 57 and the reference in footnote 13 to RR Allen Jr and T. Bernard.

proceedings and assessed by the trier of fact.⁶²⁹ By virtue of this legal text the Chamber may *proprio motu* order the production of all evidence that it considers necessary for the determination of the truth. Hence, the Chamber has the authority to act on its own initiative and to collect all evidence necessary for the establishment of the truth which goes beyond the evidence adduced by the parties. Consequently, the second sentence of article 69(3) is a reflection of the continental model of developing evidence vesting the decision-maker with an active role in the evidentiary process premised on the judicial duty for the ascertainment of the truth.

1.1. The Role of the Parties in the Processing of Evidence

The sequence in which article 69(3) envisages the involvement of the parties and of the Court in the process of developing evidence lends support to the conclusion about the principal role of the parties in that respect. This legislative approach is a logical reflection of the fact that the primary initiative for the processing of evidence rests with the Prosecutor and the defence as the key stakeholders in proceedings. After all, as posited in the legal literature, the evidence in a criminal trial is ‘aimed at proving or disproving the matter that has been put before the court for resolution.’⁶³⁰ In light of this, logically, ‘introducing evidence is not a stand-alone right, but is a right which ‘belongs to and is a core right of the parties – [...] [that is] those who bring or answer to a case before the court’.⁶³¹

1.2. The Role of the Chamber in the Fact-Finding Mechanism

Nevertheless, leaving the process of gathering evidence exclusively to the initiative and the discretion of the parties may have an inimical effect on the comprehensiveness and completeness of the factual basis for the judicial determination of the subject-matter at hand.⁶³² As, undoubtedly, the ultimate objective of criminal proceedings is the

⁶²⁹ Damaska, *supra* note 501, p. 1093, according to whom the pitfalls of the adversarial model of developing evidence may affect the completeness of the factual basis for the decision.

⁶³⁰ Friman, *supra* note 25.

⁶³¹ *Ibid.*, p. 49.

⁶³² See along the same lines Damaska, *supra* note 501, p. 1093. The same concerns have been raised in the context of proceedings at the ICJ, where commentators have noted that neglecting the Court’s powers to *proprio*

establishment of the truth, if the trier of fact is of the opinion that the search for the truth necessitates the collection of further evidence, the authority pursuant to the second sentence of article 69(3) comes into play. Notwithstanding the assertion that ‘while the Prosecutor has the *duty* [italics in the original] under [a]rticle 54(a) “to establish the truth” there is no parallel provision for the Trial Chamber as such’,⁶³³ still, the relevant literature acknowledges that the Chamber’s authority to request the submission of all evidence that it considers necessary for the determination of the truth ‘comes very close’ to an obligation to establish the truth.⁶³⁴ In fact, the judicial authority to request the submission of all evidence conducive to the ascertainment of the truth pursuant to article 69(3) and the duty of the Chamber to determine the truth represent two sides of the same coin.

Some authors contend that pursuant to article 69(3) the judges ‘may choose to take an active part, which is more reflective of traditional inquisitorial systems, or they may choose to let the parties dominate the proceedings.’⁶³⁵ Hence, according to this view, the judges have the option of exercising a dominant role in the proceedings.⁶³⁶ Such an understanding sounds rather hasty as it fails to unravel the whole rationale behind article 69(3). The thorough analysis of this legal text lends support to the conclusion that the Chamber is duty-bound to assume an active role in the evidence-gathering process in case it considers that the evidence submitted by the parties does not suffice for the ascertainment of the subject-matter at hand. In light of its duty to unearth the truth, if the Chamber deems that the elucidation of the facts and circumstances under examination necessitates the collection of further evidence in addition to that adduced by the parties, it must take over the evidence-gathering process. That is to say, in order to properly fulfill the ultimate objective of the criminal justice process – the establishment of the truth – the Court is duty-bound to avail itself of the powers pursuant to article 69(3) when the necessity for that arises.

The Chamber’s duty to intervene in the evidence-gathering process in order to determine the truth is likewise reflected in article 64(6)(d). This legal text empowers the

motu gather additional evidentiary material results in insufficiency of evidence on the basis of which the Court reaches its findings on the merits of the case – see Riddell and Plant, *supra* note 481, p. 69.

⁶³³ Robert Heinsch, ‘How to achieve fair and expeditious trial proceedings before the ICC: is it time for a more judge-dominated approach?’ in *The Emerging Practice of the ICC*, Carsten Stahn and Göran Sluiter (eds.), Martinus Nijhoff, 2009, pp. 477-500, p. 486.

⁶³⁴ *Ibid.*

⁶³⁵ McGonigle, *supra* note 362, p. 109

⁶³⁶ *Ibid.* See also Ambos, *supra* note 627, pp. 19-20.

Trial Chamber to order the submission of evidence in addition to that already collected prior to the trial or presented during the trial by the parties. The same logic imbues also the proceedings on an admission of guilt stipulated in article 65 and rule 139. Pursuant to these norms, the Chamber is neither bound by the accused's admission of guilt, nor by any discussions between the parties in this regard, including the modification of charges or the penalty to be imposed.⁶³⁷ As provided for in article 65(2) and (3), notwithstanding the admission of guilt by the accused, the Trial Chamber shall order continuation of the trial under the ordinary trial procedures, unless it is satisfied that the evidence presented establishes all the essential facts that are required to prove the crime to which the admission of guilt relates. In addition, regardless of the admission of guilt made by the accused, still, the Chamber may request the Prosecutor to present additional evidence as provided for in article 65(4),⁶³⁸ if it considers that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims. Given all the above and the fundamental importance of the search for and the determination of the truth, the view that the ICC's judges 'are not in principle supposed, save in very exceptional cases, to involve themselves in the gathering of evidence'⁶³⁹ is neither in concord with the wording nor with the spirit of the evidence-related framework.

The judicial duty for active involvement in the fact-finding procedure aimed at the ascertainment of the truth, which imbues the ICC's proof-gathering style, transpires also in proceedings before other international(ized) fora. An apposite example in this regard provides the ECCC's legal framework, which envisions the Chamber's duty for the determination of the truth in a similar fashion. To this effect is rule 87(4) of the Internal Rules which empowers the judicial authority to summon or hear any person as a witness or admit any new evidence, as long as the Chamber deems it to be conducive to establishing the truth.

The ICJ reveals a similar example in this respect. According to article 53(2) of ICJ's Statute, the decision-maker is not discharged from the duty to ascertain that the

⁶³⁷ Articles 65(3) and 65(5).

⁶³⁸ Hence, the active role of the Chamber in the fact-finding process neither should nor could be confined only to the collection of evidence that is beneficial to the accused. *See*, however, an opinion in the opposite strain - Zappalà, *supra* note 11.

⁶³⁹ Jorda and de Hemptinne, *supra* note 1, p. 1412, who observe that the ICC's process does not provide for 'an investigative judge with responsibility for collecting all items of evidence which [...] help to establish the truth' at the investigative stage of proceedings. Similarly, according to the dissenting opinion of Judge Pikis to the Appeals Chamber Judgment of 11 July 2008, para. 12, '[n]either the Trial Chamber nor the Pre-Trial Chamber is concerned with the collection of evidence'.

claim is well founded in fact and in law, regardless of the fact that a party does not appear in proceedings or fails to defend its case. Consequently, by virtue of this legal text, the ultimate authority for the establishment of the truth rests with the trier of fact. Observations in the same vein have been voiced in the relevant literature where it is acknowledged that determining the facts is a core responsibility of the Court. Commentators have advanced the reasonable assertion that the ICJ may not consider as proven the facts alleged by one party for the sole reason that the other party has not cooperated in producing evidence.⁶⁴⁰ Similarly, in a Separate Opinion to the ICJ's Oil Platforms case it has been averred that the Court's evidentiary rules should be administered in a fair and equitable manner, so that the Court gets at the whole truth as the basis for its final conclusion.⁶⁴¹

In light of this succinct comparative note, it becomes evident that the key role of the parties in the processing of evidence does not, as a matter of principle, exempt the judicial authority from its core task to establish the truth and, accordingly, to be actively engaged in the collection of evidence, when necessary. The active involvement of the parties in the processing of evidence does not affect the authority of the decision-maker to *proprio motu* gather evidence in addition to that already collected prior to trial or presented by the parties during the trial.⁶⁴²

Bringing the ICC back into focus, the power of the Court to collect evidence on its own motion pursuant to article 69(3) occasions the question whether the Chamber is constrained to request evidence exclusively from the parties or has an unfettered authority to request all evidence conducive to the establishment of the truth from anyone, regardless of the source.

The view that the Chamber may request the submission of evidence solely from the parties, albeit rather debatable, finds some support in the literature and in practice. To this effect, the dissenting Judges to the Appeals Chamber Judgment of 11 July 2008 have opined that '[t]he reference to the submission of evidence in the second sentence [of article 69(3)] refers [...] to the ability of the Court to request the parties to submit all

⁶⁴⁰ Riddell and Plants, *supra* note 481, p. 119 and footnote 146.

⁶⁴¹ Separate opinion of Judge Owada, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I. C. J. Reports 2003, p. 161.

⁶⁴² This authority is premised both on article 64(6)(d) and article 69(3).

evidence that is necessary for the establishment of the truth’,⁶⁴³ consequently, that ‘[t]he Trial Chamber [...] may request either party to submit all evidence that it considers necessary for the determination of the truth’.⁶⁴⁴

In the same spirit, some commentators have contended that ‘[i]n terms of the context [...] the [second] sentence [of article 69(3)] probably means, “The Court shall have the authority to request [*from the parties*]⁶⁴⁵ the submission of all evidence that it considers necessary for the determination of the truth.”’⁶⁴⁶ Also, it has been averred that, albeit the wording of ‘[a]rticles 64(6)(d) and 69(3) [...] indicates that someone else is to present the further evidence; [...] the provisions do not specify who should then do so: always the prosecution (in the light of the objectivity principle in [article] 54(1)(a) of the ICC Statute), one of the parties, or even a ‘participant’ like a victim?’⁶⁴⁷

The careful perusal of the ICC’s statutory documents warrants the conclusion that neither the letter nor the spirit of the law lends support to such a restrictive interpretation of the Chamber’s evidence-gathering powers. The normative basis does not pre-determine or limit the manner in which the decision-maker is to elucidate the facts and circumstances under consideration in the case at hand. The relevant legal texts neither explicitly, nor implicitly dictate that the Chamber could request solely from the parties (and participants) the submission of all evidence which it considers necessary for the determination of the truth. Quite to the contrary, the Chamber has the authority to call additional evidence itself⁶⁴⁸ and could equally request the evidence necessary for the ascertainment of the truth from *any* person, not merely from the parties and participants (thus, irrespective of whether that person has any standing in the proceedings of the case at hand).

This logic is deeply rooted in a number of provisions of the ICC’s legal framework. In particular, by virtue of article 72(2) the Court is vested with the power to request information or evidence from ‘a person’. This norm envisions ‘a person who has

⁶⁴³ *Lubanga*, Partly dissenting opinion of 23 July 2008 of Judge Philippe Kirsch to the Judgment of the Appeals Chamber of 11 July 2008, (partly dissenting opinion of Judge Kirsch), para. 19.

⁶⁴⁴ *Lubanga*, Dissenting opinion of Judge Pikis to the Judgment of the Appeals Chamber of 11 July 2008, para. 12.

⁶⁴⁵ Square brackets and italics in the original.

⁶⁴⁶ McDermott, *supra* note 33, p. 43.

⁶⁴⁷ Friman, *supra* note 25, p. 494 (references omitted).

⁶⁴⁸ See a contention in the opposite vein: Friman, *supra* note 25, p. 494. The author espouses the view that article 69(3) ‘indicates that someone else is to present the further evidence; another solution would have been to allow the Court to call additional evidence itself.’

been requested [by the Court] to give information or evidence'. The expression employed in article 72(2) denotes a person extraneous to the proceedings at hand, who is in a possession of information and/or evidence conducive to the determination of the truth. To the same effect is article 73, which authorizes the Court to request third-party information or documents. Pursuant to this norm, the Court is empowered to request from a State Party the production of documents or information which are in its custody, possession or control. States Parties to the Rome Statute could neither assume the standing of a party nor of a participant in its own right in the ICC's proceedings.

Given this fact and in light of the explicit proviso of article 73 it is to be concluded that the powers of the Court to request evidence go beyond the parties and the participants to the case at hand. In the same vein is rule 73(6) which envisages the possibility for the Court to seek from the ICRC or from other sources ICRC information, documents or other evidence which it deems to be of great importance for a particular case. Just like State Parties, envisioned in article 73, the ICRC, referred to in rule 73(6), is neither a party nor a participant in proceedings before the Court. Consequently, each of the legal texts contemplated above stipulates scenarios whereby evidence conducive to the ascertainment of the truth is gathered on the Court's own motion from sources which are not confined to either party or participants.

Notably, the same rationale permeates the evidence-gathering process before other criminal justice bodies at the international level. To this effect is, for instance, rule 87(3) of ECCC's Internal Rules, which stipulates that the Chamber bases its conclusion on evidence from the case file provided it has been put before it by a party or *if the Chamber itself has put it before the parties*. The latter part of the provision is an unambiguous indication of the authority of the Chamber to call evidence *proprio motu* from sources different from the parties and, accordingly, to place such evidence before the parties.

Similarly, according to rule 98 of ICTY's and ICTR's Rules of Procedure and Evidence, besides its power to request additional evidence from the parties, the Trial Chamber is vested with the authority to summon witnesses on its own motion and to order their attendance. Consequently, the *ad hoc* tribunals have the authority to collect evidence not solely by requesting its submission from the parties, but also to call evidence themselves in addition to that presented by the Prosecutor and the defence.

At the SCSL, rule 85(A)(iv) which governs the order of presentation of evidence makes an explicit and separate reference to the evidence ordered by the Trial Chamber as distinguished from the evidence to be presented by the parties. Hence, the logical conclusion to be advanced is that the Chamber has the discretion to collect and put before the parties evidence gathered on its own volition, that is, evidence not submitted by the parties.

The legal framework of another adjudicative body at the international level beyond the realm of criminal proceedings - the ICJ – enjoins the decision-maker with a similar authority in the processing of evidence. In addition to the evidence that the Court may order from the parties,⁶⁴⁹ it may equally request additional information from sources extraneous to the extant proceedings, such as, for instance, public international organizations. Instructive in this regard are the provisions of article 34(2) of the ICJ's Statute and article 61(1) of the ICJ's Rules of Court. According to the latter provision, at any time prior to the closure of the oral proceedings, the Court may, not only at the request of a party, but also *proprio motu* request a public international organization to furnish information relevant to a case before it. Similarly, pursuant to article 62(1) of the Rules of Court, in addition to requesting evidence or explanations from the parties considered to be necessary for the elucidation of the case, the Court may seek other information for this purpose. Furthermore, by virtue of article 62(2) of the Rules of Court the ICJ is empowered to call witnesses on its own motion.⁶⁵⁰

1.3. The Role of the Victims in the Fact-Finding Process in Proceedings on the Merits of the Criminal Case

All the above manifests that the ICC's legal framework provides for an active part of both the parties and of the Court, when necessary, in the processing of evidence on the merits of the case. Conversely, with respect to victims, the Statute makes no mention of their

⁶⁴⁹ The wide discretion of the Court to gather evidence on its own volition is reflected in article 49 of the Statute, according to which the Court may, even before the hearing begins, call upon the agents of the parties to produce any document. *See* along the same lines article 62(1) of the Rules of Court, according to which the Court may at any time call upon the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue.

⁶⁵⁰ In the same vein are the observations advanced by commentators that the ICJ has been invested with wide-ranging authority to intervene in the production of evidence and to obtain evidence on its own initiative. *See* Riddell and Plant, *supra* note 481.

role, if any, in the developing of evidence on the subject-matter of the criminal justice process. The ICC's drafting history reveals that the issue whether victims could intervene in the evidence-related process proved to be problematic and prompted diverging views among delegations.⁶⁵¹ Eventually, as reflected in the relevant literature and in the Court's jurisprudence,⁶⁵² the question whether and to what extent victims could impact the processing of evidence was left outside the Statute's purview. Subsequently, the silence was partially remedied by the introduction of rule 91. This norm introduced the conditional possibility for victims to intervene in the examination of evidence *via* their legal representative(s), thus, vicariously. The Rules, however, akin to the Statute, remain silent as to whether victims may play an active part in the evidence-gathering process through the submission of evidence. Consequently, the ICC's normative basis does not provide an answer to the question whether victims could impact the scope and substance of the evidence by way of placing material before the Chamber.

The rationale behind the divergent legal regimes governing the involvement of the parties and of victims in the process of developing evidence stems from the essence of the ICC's criminal procedure which designates different roles to the Prosecutor and the defence, on the one hand, and to victims, on the other. On the whole, the primary purpose of the criminal justice process, national and international alike, is bringing to book criminal offenders through their prosecution and, in case of an adjudication of guilt, their punishment. Hence, the core of the subject-matter of the case delineated by the charges brought by the Prosecutor and confirmed by the ICC's Pre-Trial Chamber,⁶⁵³ is the individual criminal responsibility of the accused in light of the objective and subjective elements of the crimes under consideration. By implication, the subject of examination and proof in the course of the proceedings subsumes, but is not confined to facts related to the inimical consequences of the commission of the crime(s) charged. Consequently, the elucidation of the harm sustained by victims as a result of the alleged crime(s) is not the sole objective of proceedings adjudicating the individual criminal responsibility of the accused. Said differently, '[a]lthough serving the interests of victims is both a laudable

⁶⁵¹ Bitti and Friman, *supra* note 235, p. 461.

⁶⁵² Schabas, *supra* note 361, p. 832 in the same spirit; *Katanga and Ngudjolo*, TC II, 22 January 2010, para. 52, where it is observed that 'during the drafting of the Statute, proposals for the victims to be able to present evidence for the purpose of establishing the criminal responsibility of the accused *via* their legal representatives were not retained in the final version of the Statute.'

⁶⁵³ See in the present context also article 61(9) and regulation 55 of the Regulations of the Court both of which envision the possibility for subsequent amendment of the charges.

goal and obligation of the Court, it is not the primary function [of the Court]. Rather, the Court's primary purpose is to establish the truth as it pertains to the guilt or innocence of an accused through efficient and fair proceedings.'⁶⁵⁴

As previously mentioned, in order for the parties to achieve the objectives they pursue at trial, they are empowered by law to take an active role in the process of developing evidence. The Prosecutor who brings the charges against the accused is, accordingly, supposed to substantiate them, whereas the defence endeavours to disprove the charges.⁶⁵⁵ At the same time, unlike the parties, victims at the ICC are exempt from the task to either prove or disprove the charges brought against the accused.⁶⁵⁶ Victims neither bring nor support or answer to a case concerning the individual criminal responsibility of the accused. Given the fact that, by contrast to the Prosecutor and the defence, victim-participants are not primary protagonists at the ICC's arena, they are assigned a limited involvement in the evidence-gathering process.⁶⁵⁷ If participating victims were entitled to an unqualified intervention in the processing of evidence, this could impact the strategy of the parties and their approach towards the evidentiary material (with respect to their lines of questioning, etc.) chosen to best serve the interests they represent at trial. As a result, the parties' contribution to the ICC's fact-finding procedure and, ultimately, their impact on the outcome of the case could be inimically affected. In addition, an unrestricted involvement of victims in the evidence-gathering process would likewise jeopardize the expeditiousness of proceedings and shift the focus of the ICC's process away from its core purpose to collateral issues instead.

Similar is the situation at the STL, where victim-participants assume a role akin to the one afforded to victims in the ICC's proceedings on the merits.⁶⁵⁸ Although the STL's legal framework provides a more elaborate regime of victims' engagement in the evidentiary procedure, the overall concept underpinning the relevant provisions is in tune with the victims' non-party standing. Hence, albeit victim-participants at the STL are

⁶⁵⁴ McGonigle, *supra* note 362, p. 144 (footnote omitted).

⁶⁵⁵ Similarly, Dissent of Judge Pikis to the Judgment of the Appeals Chamber of 11 July 2008.

⁶⁵⁶ See in this strain Friman, *supra* note 25, p. 492, who observes that 'the general victim participation scheme of the ICC [...] does not relate to the victim pursuing a particular matter to be adjudicated by the Court; he or she does not bring a case (leaving aside the procedural standing of the victim with respect to reparations).'

⁶⁵⁷ As duly noted by Judge Pikis, 'the proof or disproof of the charges is a matter affecting the adversaries [...] The victims have no say in the matter [...] It is not the victims' concern [...] to either prove or disprove the charges [...] The presumption of innocence leaves no room for anyone other than the Prosecutor to assert the contrary and seek to prove it by the adduction of relevant evidence, admissible in the criminal proceedings before the Chamber.' – see the Dissent to the Appeals Chamber Judgment of 11 July 2008.

⁶⁵⁸ Note, however, that the STL's legal framework does not provide for reparation proceedings.

explicitly afforded the possibility to take part in the submission, as well as in the production of evidence, still they may not intervene in the fact-finding procedure automatically, as of right. The involvement of victim-participants in the processing of evidence is contingent on the discretion and authorization of the Chamber in charge of the proceedings. The latter, on its part, rules on the victims' request after consultation with the parties. All of the above attests to the similar rationale behind the scope of victims' intervention in the evidentiary procedure before the ICC and the STL. Both judicial institutions provide for a more limited involvement of victim-participants in the evidence-gathering process than that enjoyed by the parties.

Not surprisingly, at the ECCC the situation in that respect is different. To start with, the perusal of the legal framework manifests that the part assigned to victims in proceedings before the Cambodian tribunal goes beyond the presentation of views and concerns. Victims at the ECCC assume a central role in proceedings which emanates from their standing as a party to the case, *i.e.* civil parties. This 'tripartite structure of proceedings' at the ECCC, as asserted by commentators, takes the participation of victims a step further than that envisaged by the ICC.⁶⁵⁹

More precisely, civil parties are afforded as of right an active and independent role in the proof-gathering process. Civil parties are not only granted the right to engage in the examination of evidence, but are likewise explicitly accorded the right to adduce evidence themselves in their own right, will and initiative.⁶⁶⁰ This enhanced involvement of civil parties in the evidentiary process is a corollary of their central standing in proceedings and, accordingly, of the nature and extent of civil party action.

Besides seeking reparations,⁶⁶¹ the other concurrent purpose of civil party action envisaged in rule 23(1) of the ECCC's Internal Rules is to support the prosecution.⁶⁶² Hence, in order to avail themselves of this right, civil parties are granted a greater leeway

⁶⁵⁹ Kelsall *et al*, *supra* note 281, p. 28.

⁶⁶⁰ See, in particular, rule 59(5) of the ECCC's Internal Rules, according to which civil parties at any time during an investigation may request the Co-Investigating Judges to interview him or her, question witnesses, go to a site, order expertise or collect other evidence on his or her behalf. In the same vein is rule 31(10) of the Internal Rules (concerning the appointment of (an) additional expert(s) upon the civil parties' request). See also rules 55(10), 80(2) and 84 of the Internal Rules.

⁶⁶¹ Rule 23(1)(b) of the ECCC's Internal Rules.

⁶⁶² Some authors interpret this provision as introducing a requirement that the civil parties support the prosecution, thus, regard it as undermining the rights of the accused – see the discussion suggested by Stan Starygin, 'Internal rules of the extraordinary chambers in the courts of Cambodia (ECCC): Setting an example of the rule of law by breaking the law?', *Journal of Law and Conflict Resolution*, vol. 3(2) (2011), pp. 20-42, p. 21 *et seq.*

in the processing of evidence on the merits, both in terms of the submission and the examination of evidentiary material. In the present context it is worth clarifying that supporting the prosecution is neither an obligation, nor does it equate the status of civil party to that of additional Prosecutor(s), notwithstanding some publications in the opposite sense.⁶⁶³ The jurisprudence of the ECCC has consistently acknowledged that supporting the prosecution is a right afforded to civil parties.⁶⁶⁴ As rightly observed, the entitlement of civil parties to support the prosecution ensues from the civil parties' interest in the determination of the elements of the crime which, if proved, form the basis for their civil claims.⁶⁶⁵ Nevertheless, civil parties, unlike the Prosecutor, are not required to perform prosecutorial and/or investigative actions.⁶⁶⁶ Civil parties at the ECCC are afforded the possibility to request investigatory actions from the Co-Investigating Judges, but are not obliged to do so.⁶⁶⁷ This is an additional clear-cut indication that supporting the prosecution is solely an entitlement rather than an obligation. The only party that is obliged to perform prosecutorial/investigative actions is the Prosecutor by virtue of the onus of proof set forth in rule 87(1), second sentence of ECCC's Internal Rules. Consequently, the civil parties' entitlement to an active involvement in the evidence-gathering process in their own right, will and initiative is a reflection of the essence and purpose of civil party action as provided by law.

All the above illustrates that the extent of victims' involvement into the fact-finding procedure is a corollary of the standing and the role afforded to them in the proceedings as a whole. The greater the part played in the criminal justice process, the greater the engagement in the processing of evidence afforded by law.

⁶⁶³ Charline Yim, 'The Scope of Victim Participation Before the ICC and the ECCC', *News about the Khmer Rouge Tribunal* (available online), Sunday, 13 February 2011.

⁶⁶⁴ ECCC, Case 001, Trial Chamber Decision of 9 October 2009, para. 33.

⁶⁶⁵ *Ibid.*

⁶⁶⁶ *Ibid.*, para. 26, where the Chamber correctly noted that the civil parties have the right (*ergo*, not the obligation) to support/assist the prosecutor, however, their role must not transform them into additional prosecutors.

⁶⁶⁷ See e.g. rule 59(5) of the ECCC's Internal Rules, which employs the conditional wording 'may'.

2. Production of Evidence on the Merits of the Criminal Case

2.1. Production of Evidence by the Parties

The interdependence between a person's standing in proceedings and the role in the processing of evidence becomes even more distinct when the explicit and autonomous right of the parties to submit evidence is juxtaposed with the silence of the ICC's legal framework in relation to victim-participants. For that purpose, a succinct overview of the wide-ranging entitlement of the parties as regards the production of evidence on the merits and the corresponding disclosure obligations proves herewith apposite.

Given that 'evidence is the medium or means by which a fact is proved or disproved',⁶⁶⁸ the right of the parties to actively engage in the submission of evidence germane to the subject-matter under consideration is intrinsically linked to the mission they pursue at trial. The Prosecutor and the defence alike may produce evidence as of right, by virtue of articles 64(8)(b) and 69(3), first sentence. In accordance with these provisions, the parties are empowered to lead evidence relevant to the case, subject to the directions of the Presiding Judge. Consequently, the ICC's legal framework affords the parties the right to submit evidence pertinent to the subject-matter at hand on their own will and initiative, and without the prior authorization of the Chamber.

The entitlement to submit evidence entails a reciprocal obligation for the disclosure of evidence intended for use at trial. For the sake of safeguarding the fairness of proceedings and, in particular, of ensuring that a party is not taken by surprise by evidence presented by its opponent, both the Prosecutor and the defence are required to disclose the evidence on which they intend to rely at the hearing. To that effect are rules 76-77 and rules 78-79, respectively, which introduce disclosure obligations of each party *vis-à-vis* the opposite party. In the same vein, at the trial stage of proceedings when the Court avails itself of the authority to collect evidence on its own motion pursuant to article 69(3), second sentence, the parties shall have the opportunity to get acquainted with and discuss the evidence put before them by the Chamber. Instructive in this respect is article 74(2)

⁶⁶⁸ See Riddell and Plant, *supra* note 481, at p. 79, where the authors cite *Corpus Juris Secundum: A Complete Restatement of the Entire American Law*, FJ Ludes and HJ Gilbert (eds.), vol. 31A, West Publishing, 1964, p. 820.

which stipulates that the Court may base its decision only on evidence submitted and discussed before it at the trial.

As far as the pre-trial stage of the case is concerned, the timely disclosure of information between the Prosecutor and the person in respect of whom a warrant of arrest or a summons to appear has been issued is to be ensured by the Pre-Trial Chamber in charge of the proceedings by virtue of article 61 and rule 121. For the purpose of enabling adequate preparation for trial article 64(3)(c) entrusts the Trial Chamber with the duty to ensure that the parties perform their disclosure obligations sufficiently in advance of the commencement of the trial, including by convening status conferences for that purpose, as provided for in regulation 54(l) of the Regulations of the Court.

In the context of disclosure of evidence, a brief consideration should also be given to the following. In addition to any other disclosure required by the legal framework, article 67(2) enjoins the prosecuting authority with the obligation to disclose to the defence any exculpatory evidence in its possession or control that it believes: show or tend to show the innocence of the accused; mitigate the guilt of the accused; may affect the credibility of the Prosecution's evidence.⁶⁶⁹ This provision serves as an eloquent illustration of the specific mission pursued by the Prosecutor in the course of the proceedings, that is, the mission of an '*officer of justice*' rather than [of] a partisan advocate".⁶⁷⁰ In fact, a number of statutory provisions entrust the prosecuting authority with the duty of objectivity in the course of the criminal justice process, from its very inception up until the pronouncement of final judgment.⁶⁷¹ By reference to the ICC's drafting history,⁶⁷² the Appeals Chamber has posited that 'the Prosecutor's disclosure obligations to the accused are linked to the Prosecutor's role in conducting the investigation, and stem from the Prosecutor's obligation to investigate incriminating and exonerating circumstances equally under article 54(1)(a)'.⁶⁷³

⁶⁶⁹ As regards the right of the defence to disclosure TC II opined that this right cannot be considered to be absolute and should be balanced with the right to protection to which witnesses and victims are entitled – see *Katanga and Ngudjolo*, Version publique expurgée de la « Décision relative à la protection des témoins à charge 267 et 353 » du 20 mai 2009 (ICC-01/04-01/07-1156-Conf-Exp), ICC-01/04-01/07-1179, 28 May 2009, para. 31.

⁶⁷⁰ Kress, *supra* note 624, p. 608 (italics in the original).

⁶⁷¹ See in addition articles 54, 82 and 84, as well as article 81 and rule 152(2).

⁶⁷² United Nations General Assembly, Draft Report of the Preparatory Committee, 23 August 1996, A/AC.249/L.15, p. 14: 'Given the fact that the Prosecutor would have earlier access to evidence and /other information, it was recommended that a mechanism be found that would neutralize any potential advantage to the Prosecutor over the defence.'

⁶⁷³ Judgment of the Appeals Chamber of 16 July 2010, para. 75.

The above lends support to the conclusion that both the right of the parties to produce evidence on the merits of the case, as well as their reciprocal disclosure obligations are subject to an elaborate set of provisions in the ICC's constitutive instruments.

2.2. The Contribution of Victims to the Production of Evidence on the Merits of the Criminal Case

It is worth recalling that, by contrast to the comprehensive regime delineating the production of evidence by the parties and the respective reciprocal disclosure obligations, the legal framework does not envision a possibility for victims to adduce evidence. The ICC's drafting history attests to the fact that considerations in this regard were contemplated throughout the negotiations, but were ultimately discarded. As noted both in practice and in literature, this was due to the fact that the drafters were unable to agree on more precise provisions on this point.⁶⁷⁴ Consequently, the silence of the Court's legal texts on the possibility of victims to engage in the presentation of evidence represents a 'constructive ambiguity' rather than an oversight on the part of the founders.

The silence of the Court's normative basis should not, however, be construed as ruling out outright any possibility for victims to contribute to the collection of evidentiary material. It would be wrong to presume that the lack of an explicit provision in this respect is tantamount to a prohibition. As will be seen shortly, in the course of the fact-finding stage of proceedings instances may arise where victims could enhance the processing of evidence either in a passive or in a more pro-active way.

Victim-participants may contribute to the fact-finding process in a passive way, that is, by providing material relevant to the case not upon their own initiative, but when requested to do so. Such a scenario would unfold when a victim-participant is called to testify, and thus assumes simultaneously the status of witness appearing before the Court.⁶⁷⁵ Although the procedural phenomenon of duality of victim-witness status has already been contemplated at length, a few features of the scenario pursuant to which a

⁶⁷⁴ See e.g. Schabas *supra* note 361, p. 832; *Katanga and Ngudjolo*, TC II, 22 January 2010, para. 52, where it is observed that 'during the drafting of the Statute, proposals for the victims to be able to present evidence for the purpose of establishing the criminal responsibility of the accused via their legal representatives were not retained in the final version of the Statute' (footnote omitted).

⁶⁷⁵ See *infra* the chapter on dual status individuals (Chapter Four).

victim takes the witness's stand are worth recalling at this point. When the testimony of a particular participating victim is deemed important for the ascertainment of the truth, two possible courses of action come to the fore. Pursuant to the first one, the victim's appearance at trial may be arranged by the parties by virtue of their right to submit evidence pursuant to article 69(3). The second possibility is when the Chamber acting *proprio motu* in accordance with article 69(3) read in conjunction with article 64(6)(d) requests the appearance of the victim for the purpose of taking the witness's stand. As a result, the victim's testimony would be collected as a piece of oral evidence upon the initiative of the parties or upon the discretion of the relevant Chamber,⁶⁷⁶ but not upon the initiative of the victim-witness concerned. In other words, pursuant to this scenario, the concurrent participation of the victim as a witness in the same case is contingent on the need of the parties and/or the decision-maker for such an involvement.⁶⁷⁷

A different scenario allowing a more pro-active role on the part of victims in the processing of evidence could likewise come to the surface. During the presentation of their views and concerns victims may bring to the attention of the parties and the Chamber certain piece(s) of evidence relevant to the case, the collection of which has neither been requested by the parties nor ordered so far by the Chamber. It is reasonable to expect that some material in the knowledge and/or possession of victim-participants with a bearing on their personal interests could be conducive to the ascertainment of circumstances germane to the subject-matter at hand. Hence, such pieces of evidence may prove necessary for the further illumination of facts relevant to the case and, ultimately, for the determination of the truth. This train of thoughts occasions the question as to how relevant material brought to the attention of the parties and the Chamber by victim-participants could be incorporated into the evidentiary material. In other words, 'could victims in reality [engage in the production of evidence] without being a party?'⁶⁷⁸

⁶⁷⁶ In the same spirit, in his partly dissenting opinion to the Judgment of the Appeals Chamber of 11 July 2008 Judge Kirsch distinguished the question whether victims may lead evidence from the victims' ability to be called as witnesses to give evidence. The same scenario, pursuant to which victims are passive evidence-providers (sources of evidence), would unfold when victims are requested by the Chamber to provide also other type of evidence, apart from testimony, of which the Chamber or the parties are aware to be in the possession of the victim concerned. See in this regard, Judgment of the Appeals Chamber of 16 July 2010, para. 86: 'This is also the case where it is specifically brought to the attention of the Trial Chamber by one of the parties or participants that potentially exculpatory information exists and is in the possession of a participating victim'.

⁶⁷⁷ See in the same vein, Edwards, *supra* note 448, p. 976.

⁶⁷⁸ Friman, *supra* note 25, p. 494.

Concerns of the kind are not surprising in view of the silence of the constitutive instruments in this regard. The lack of any explicit provision on the potential involvement of victims in the evidence-gathering process has prompted divergent standpoints in practice. The initial jurisprudence in the *Lubanga* case⁶⁷⁹ espoused the view that victims, upon discrete application and judicial authorization, could tender evidence which would assist the Chamber in the determination of the truth ‘if in this sense the Court has “requested” the evidence’.⁶⁸⁰ These findings sound somewhat incoherent and ambiguous, to say the least. On the one hand, the wording ‘tender’ suggests that the evidence would be submitted upon the victims’ own motion, while at the same time the wording ‘request’ implies instead that the evidence would be collected upon the discretion and on the demand of the Chamber. If these judicial findings were to be interpreted in favour of affording victims the initiative to lead evidence on the merits of the case, *i.e.* to actively intervene in the evidence-gathering process upon their own choice and initiative, the procedural standing of victims would be equated to the standing of parties to the proceedings. Undoubtedly, such a viewpoint would run afoul of the intentions of the drafters as regards the essence and the confines of the involvement of victims in the ICC’s process. As previously noted, victims, by contrast to the Prosecutor and the defence, do not assume the role of chief adversaries on the ICC’s arena on the merits of the criminal case.

It is to be noted that two of the Judges of the Appeals Chamber dissented from this understanding by contending that the right to lead evidence belongs exclusively to the parties and by underscoring the victims’ non-party standing in the ICC’s criminal justice process.⁶⁸¹ The dissenting Judges opined that allowing victims to engage in the collection of evidence would be contrary to the wording and the spirit of the Court’s normative basis and thus completely ruled out such a scenario.

Indubitably, the majority’s understanding could potentially efface the fundamental difference between the position of the parties and of victim-participants in proceedings on the merits. The two dissents, on their part, fall short of discerning any possibility whereby information which affects the victims’ personal interests and is conducive to the determination of the truth could be incorporated into the evidentiary material without

⁶⁷⁹ *Lubanga*, TC I, 18 January 2008; *Lubanga*, Appeals Chamber, 11 July 2008.

⁶⁸⁰ *Lubanga*, TC I, 18 January 2008, para. 108.

⁶⁸¹ *Lubanga*, Partly dissenting opinion of Judge Kirsch and dissenting opinion of Judge Pikis to the Judgment of the Appeals Chamber of 11 July 2008.

infringing the spirit of the law. Consequently, whereas the majority's understanding is overly indulgent, the standpoint advanced in the dissents appears quite restrictive.

These two rather opposing viewpoints in the ICC's initial jurisprudence have subsequently been reconciled to a certain extent by the Appeals Chamber.⁶⁸² Whilst the Appeals Chamber's Judgment (this time unanimously) did not grant victims a right to adduce evidence, it nevertheless acknowledged the possibility whereby information provided by victims which is relevant to the determination of the truth could be incorporated by the Chamber into the evidentiary material. The Appeals Chamber conditioned the inclusion into the trial evidence of material in the possession and/or knowledge of victims upon the following concurrent requirements. First, the evidence at hand should be such as to affect the victims' personal interests. That is to say, the intervention of victims pursuant to article 68(3) should be warranted in the present instance. Secondly, the evidence must be necessary for the establishment of the truth. Thirdly, its inclusion in the evidentiary material must not be prejudicial to or inconsistent with the rights of the accused, fairness and impartiality of the proceedings. This time the Appeals Chamber clearly underscored that 'victims do not have the right to present evidence during the trial',⁶⁸³ since, unlike the parties, they lack the possibility to adduce evidence autonomously, *i.e.* independently from the discretion and the authorisation of the Chamber. Accordingly, the Appeals Chamber noted the possibility of victims *being requested* by the Chamber in charge of the proceedings to submit evidence upon an assessment of the requirements contemplated above and in accordance with the Chamber's powers pursuant to the second sentence of article 69(3).⁶⁸⁴ On the basis of the above it is reasonable to conclude that pursuant to the scenario depicted by the Appeals Chamber, the decision-maker would be acting according to its authority envisaged in article 64(6)(b) and (d) to order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties. This, as noted earlier, could be achieved by, *inter alia*, requiring the attendance and testimony of witnesses, the production of documents or other evidence.

These findings of the Appeals Chamber are in tune with the rationale behind victims' participation before the ICC. Through the presentation of views and concerns

⁶⁸² *Katanga and Ngudjolo*, Judgment of the Appeals Chamber of 16 July 2010.

⁶⁸³ *Ibid.*, para. 48.

⁶⁸⁴ *Ibid.*

victims could ‘‘whisper in the Court’s ear’ about the need for, and perhaps even availability of, additional evidence.’⁶⁸⁵ Accordingly, the possibility for victims to bring to the knowledge of the parties and the Chamber evidentiary material beneficial to the ascertainment of the truth with a bearing on their personal interests would contribute to the fact-finding process. This manner of contributing to the evidentiary material would not result in victims interfering with or assuming the autonomous role assigned to the parties in the evidentiary process: a course of action which would contradict the will of the drafters. At the same time, by bringing evidentiary material to the attention of the Court victims could substantiate assertions advanced in their views and concerns, thus, would ensure that their participation is meaningful rather than purely symbolic.

Likewise, evidentiary material becoming known for the first time during the presentation of victims’ views and concerns could assist the judicial authority in performing its duty to determine the truth. However, once victims have directed the attention of the parties and of the Chamber to the pieces of evidence, their pro-active role in the processing of evidence would be exhausted. The Chamber could either decide to request on its own initiative the submission of evidence brought into view by victims or could be ‘moved’⁶⁸⁶ by the parties to avail itself of its *proprio motu* powers envisaged in articles 64(6)(d) and 69(3). Nevertheless, whether evidence brought up by victims in support of their views and concerns would be deemed important for the ascertainment of the truth and would eventually be incorporated into the evidentiary material would depend entirely on the discretion of the decision-maker. The Chamber, upon a twofold assessment of, first, whether the evidence at hand affects the victims’ personal interests in light of article 68(3) and, secondly, the relevance and the necessity of such a material for the establishment of the truth, would decide whether at all to request its submission from the respective victim-participant(s). As the Appeals Chamber has bluntly put it, ‘[t]his decision is within the Trial Chamber’s discretion.’⁶⁸⁷

The present train of thoughts entails the question whether victims should be enjoined with disclosure obligations with respect to material the production of which has

⁶⁸⁵ Friman, *supra* note 25, p. 494.

⁶⁸⁶ The ICJ may likewise be ‘moved’ to avail itself of its powers to request evidence on its own volition – see the example suggested by Riddell and Plant, *supra* note 481, at p. 59 – a party may request the Court to exercise its *proprio motu* powers under article 62 of ICJ’s Statute to request evidence on its own motion (referring to the *ELSI* case).

⁶⁸⁷ See the Judgment of the Appeals Chamber of 16 July 2010, para. 85.

been ordered by the Chamber following its assessment pursuant to article 68(3) in accordance with article 69(3). Since such evidence would be called by the Chamber acting *proprio motu* on the basis of a case-by-case determination, it would be reasonable to conclude that no general disclosure obligation should be imposed on victims *vis-à-vis* either party or other participating victims. As already clarified, a general disclosure obligation is a corollary of an autonomous right to lead evidence, which does not extend to victims. Furthermore, it could not be known in advance which evidence suggested by victims would, if at all, be considered necessary for the determination of the truth. Only if the material put forward by victims is deemed conducive to the elucidation of the truth, would the Chamber request its submission. Accordingly, only then would disclosure to the parties and/or to the rest of the victim-participants be necessary. In other words, in the event that the Chamber concerned orders the submission of material in the possession of victims, the fair trial rights of the accused would indubitably necessitate disclosure on a case-by-case basis. The disclosure of evidence would then take place upon an order for disclosure of the Chamber in charge of the proceedings.

The same line of reasoning transpires in the relevant jurisprudence. In the view of the Appeals Chamber, since none of the ICC's constitutive documents 'expressly oblige[s] the [v]ictims to disclose exculpatory [or incriminating] evidence to the accused',⁶⁸⁸ 'imposing a general disclosure obligation on the victims [...] would disregard the [victims'] limited role [...] of presenting their views and concerns where their personal interests are affected [...] [as well as] the differing roles of the victims vis-à-vis the parties.'⁶⁸⁹ At the same time, the fact that specific instances may nevertheless require the disclosure of evidence by the victims to the accused has been acknowledged by the Appeals Chamber.⁶⁹⁰ Upon a review of the relevant jurisprudence of both the ECtHR and the IACtHR the Chamber inferred that 'disclosure of evidence after the commencement of trial [does not *per se* result] in a violation of the accused's human rights.'⁶⁹¹ The Appeals Chamber thus ruled that when victims are requested 'to submit evidence that was not previously disclosed to the accused [...] [the Chamber] will order the disclosure of the

⁶⁸⁸ *Ibid.*, para. 72.

⁶⁸⁹ *Ibid.*, para. 75.

⁶⁹⁰ See the Judgment of the Appeals Chamber of 16 July 2010, para. 71. According to the Chamber, such instances would arise 'when a party or participant brings to the attention of the Trial Chamber that such information is available and the Trial Chamber finds that such information is necessary for the determination of the truth.'

⁶⁹¹ *Ibid.*, para. 51.

evidence to the accused sufficiently in advance of its presentation at the trial, and take any other measures necessary to ensure the accused's right to a fair trial, in particular the right to "have adequate time and facilities for the preparation of the defence" [footnote omitted]'.⁶⁹²

For the reasons set out above, victim-participants have no general obligation to disclose to the parties evidence in their possession, unlike the reciprocal disclosure obligation of each party *vis-à-vis* the other party pursuant to rules 77 and 78. This, however, is without prejudice to the requirement of regulation 52(2) of the Regulations of the Registry obliging the parties and equally victim-participants to provide to the court officer the evidence intended for use at a hearing in advance of the scheduled hearing.⁶⁹³

Practice shows that the difference between rules 77-78 and regulation 52(2) of the Regulations of the Registry could appear somewhat elusive⁶⁹⁴ due to the fact that both sets of provisions refer to evidence intended for use at a hearing. However, whereas rules 77 and 78 are aimed at safeguarding the fair trial rights of the parties through the stipulation of reciprocal obligations for disclosure of the evidence on which the parties intend to rely throughout the proceedings, the purpose of regulation 52(2) of the Regulations of the Registry is to ensure the preparation, practical organization and proper conduct of the hearing. Therefore, unlike the question concerning the disclosure of evidence in the possession of victim-participants, which is to be determined on a case-by-case basis, there is a general obligation imposed on victims by the legal framework to present in advance to the court officer any document intended for use at the hearing.

3. Examination of Evidence on the Merits of the Criminal Case

Having contemplated the issues related to the submission of evidence and, in particular, the extent of victims' involvement therein, the question which logically comes to light concerns the examination of evidence on the merits. Evidence adduced by the parties and,

⁶⁹² *Ibid.*, para. 55.

⁶⁹³ Regulation 52(2) of the Regulations of the Registry requires the parties and the participants to provide to the court officer the evidence they intend to use at a hearing at least three full working days before the scheduled hearing.

⁶⁹⁴ See *Lubanga*, Decision on various issues related to witnesses' testimony during trial, ICC-01/04-01/06-1140, 29 January 2008 (*Lubanga*, TC I, Decision of 29 January 2008), for reference to the submission of the defence which refuted the Prosecutor's submissions that the disclosure of documents to be used in questioning is governed by rules 77-78 of the Rules, contending that the only legal regime applicable was regulation 52 of the Regulations of the Registry.

equally, evidence presented upon the request of the Chamber in accordance with article 69(3) is subject to examination. Instructive in this respect is article 74(2) which provides that the Court may base its decision only on evidence submitted and discussed before it at the trial.

The essence and the confines of victims' intervention in the examination of evidence at trial become easily discernible against the backdrop of the rights of the Prosecutor and the defence accorded in that respect by the constitutive instruments. Therefore, in order to properly fathom the part assigned to victims in the process of examining evidence on the merits the present analysis should first contemplate the corresponding role of the parties.

3.1. Examination of Evidence by the Parties

By virtue of rule 140(2)(b), the prosecution and the defence equally have the right to examine a witness about relevant matters related to the witness's testimony and its reliability, the credibility of the witness and other relevant matters. In tune with internationally recognized due process rights of the accused, rule 140(2)(d) enunciates the right of the defence to be the last to examine a witness, irrespective of the party who calls that witness. The law neither envisages any restrictions as regards the questioning of witnesses performed by the parties, nor limits the scope of questioning by either the Prosecutor or the defence to the witness's initial testimony. The logical conclusion, therefore, is that each party may, as of right, question one and the same witness about any matter relevant to the subject-matter of the criminal case. The rationale behind this legal approach stems from the importance of a witness's testimony as a valuable piece of oral evidence. Furthermore, since the testimony of a witness may contain information essential for the ascertainment of various issues germane to the subject-matter of the case, the legal framework neither pre-determines, nor limits the scope of the witness's examination by the parties to the witness's initial testimony.

Indubitably, albeit not expressly envisaged in the relevant provisions, but duly noted in the jurisprudence of the Court, the parties should conduct the questioning in such a manner so as to avoid recalling witnesses unnecessarily.⁶⁹⁵ This understanding is equally

⁶⁹⁵ *Ibid.*, para. 32.

applicable as a matter of principle to the questioning of all witnesses regardless of the calling party. Likewise, the Chamber, when questioning a witness pursuant to its authority under article 69(3) and rule 140(2)(c) should conduct a comprehensive examination of the witness and ensure that all relevant questions have been exhausted. Questioning which would prevent the unnecessary recalling of witnesses at trial would achieve multifaceted purposes.

First, this would safeguard the witness's psychological and, in all likelihood, physical well-being as envisaged in article 68(1). The witness would not experience the anxiety of appearing anew before the Court. As a result, any potential further secondary victimization and/or traumatization of that person would be prevented. In addition, the witness would be spared various inconveniences which the travelling to a foreign country on account of giving testimony may otherwise entail, such as spending time away from one's family, from everyday activities, from work and/or education, etc.

Secondly, avoiding recalling witnesses at trial would ensure expeditious and effective judicial proceedings. The latter, on their part, safeguard the fair trial rights of the accused, in particular, his or her right to be tried without undue delay enshrined in article 67(1)(c). Similarly, expeditiousness and effectiveness of the proceedings serve the interests of victims and the interests of justice in general.

Thirdly, avoiding recalling witnesses is also cost-effective, as it spares judicial time and resources.⁶⁹⁶ The travelling, transportation and accommodation of witnesses while in The Hague involve expenses. Other practicalities related to the proper conduct of the questioning of a witness at trial (such as simultaneous interpretation) are also time-consuming and costly.

Recalling witnesses at trial may also have an adverse impact on the search for the truth not least because of the 'vagaries of memory'.⁶⁹⁷ Admittedly, memory is prone to fade with the passage of time. In other words, 'the passage of time tends 'to edit' one's recollection of certain events'.⁶⁹⁸ Therefore, it is reasonable to expect witnesses'

⁶⁹⁶ Similar considerations have been advanced by the ICTY which favoured the cross-examination of witnesses *via* video-link to their in-court appearance, noting that it would be 'a misuse of the Tribunal's resources, and incompatible with the expeditious completion of the trial, to have the [f]our [w]itnesses travel to The Hague to give their brief testimonies.' – see *The Prosecutor v. Ante Gotovina et al*, IT-06-90-T, Reasons for decision granting prosecution's motion to cross examine four proposed rule 92 *bis* witnesses and reasons for decision to hear the evidence of those witnesses via video-conference link, 3 November 2009.

⁶⁹⁷ Jorda and de Hemptinne, *supra* note 1, p. 1400.

⁶⁹⁸ Kelsall *et al*, *supra* note 281, citing J. Cartwright, at p. 36.

recollections of relevant facts to become less clear and precise with time, thus less reliable. Furthermore, the reappearance of a particular witness before the Court may become difficult or even impossible (for instance, due to subsequent physical or mental impairment affecting the witness's fitness to give testimony or death).

In the present context it is also to be noted that the legal framework does not require the parties to disclose in advance their lines of questioning. The idea behind this legislative approach stems from the fact that the lines of questioning embraced by a party would depend to a significant extent on the issues raised and the answers given during a witness's examination at trial.⁶⁹⁹ Furthermore, the lines of questioning would also depend on the strategy chosen by the parties to best serve the mission they pursue at trial. As to the Prosecutor, he or she will be expected to question the witnesses in a way which would not merely serve the Prosecutor's case but also the search for the truth pursuant to the prosecutorial duty of objectivity entrusted by article 54(1)(a).

Nevertheless, exceptions may arise when prior disclosure of the lines of questioning by the parties would be necessary, in particular when the protection of traumatized or vulnerable witnesses is at stake. In chime with its duty for the protection of the victims, witnesses and their families as provided for in article 68(1), the Chamber concerned may order as an appropriate measure for the protection of traumatized or vulnerable witnesses prior disclosure by the parties of the questions or the topics they seek to cover during the questioning. The adoption of such an approach, which is to be assessed on a witness-by-witness basis, would correspond to the primary responsibility of the Chamber under article 64(2) to ensure the fair and expeditious conduct of the proceedings with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3.2. Examination of Evidence by the Victims

By contrast to the Prosecutor and the defence, the possibility for victims to engage in the examination of evidence, envisaged by the Court's legal framework, is neither

⁶⁹⁹ See to the same effect, *Lubanga*, TC I, Decision of 29 January 2008.

autonomous, nor full-fledged.⁷⁰⁰ Moreover, this possibility may be employed by victim-participants only in a vicarious way. According to the relevant provisions, victims may not intervene in the examination of evidence in person, but solely through their legal representative(s). The latter, on their part, cannot take part into the process of examining evidence as of right.⁷⁰¹ In order to intervene in the examination of evidence, the legal representative must be authorized to do so by the Chamber in charge of the proceedings. Hence, the involvement of the victims' legal representative(s) in the examination of evidence on the merits, such as in the questioning of witnesses, experts and the accused, is subject to a judicial assessment on a case-by-case basis, which will be discussed in more detail in the subsequent paragraphs.

The idea underpinning the extent and limits of victims' involvement in the questioning of witnesses, experts and the accused is in tune with their non-party standing in proceedings on the merits. The legal regime governing the engagement of victims in the examination of evidence adheres to the overall rationale of the victims' participation scheme carved out by the Court's founders. Thus, it may be inferred that the regime regulating the involvement of victims in the examination of evidence just as victims' participation, taken as a whole, is 'an example of the novel nature of the [ICC's legal framework], which is not the [exclusive] product of either the Romano Germanic or the common law legal systems.'⁷⁰²

Consequently, the separate and distinct legal framework delineating the role of the victims in the examination of evidence manifests the endeavours of the drafters to balance the possibility for meaningful participation on the part of victims with the rights of the parties, expeditiousness and fairness of proceedings. On the one hand, conditioning the intervention of victims in the examination of evidence upon the discretion of the Judges would guarantee that it is not inconsistent with the precepts of procedural fairness and the rights of the key stakeholders in proceedings. At the same time, affording victims the

⁷⁰⁰ As duly noted by Judge Kirsch in his partly dissenting opinion to the Judgment of the Appeals Chamber of 11 July 2008, para. 31, rule 91(3) 'regulates the limited manner in which victims may be permitted to put questions to a witness'.

⁷⁰¹ See in the same spirit the dissenting opinion of Judge Pikis to the Judgment of the Appeals Chamber of 11 July 2008. Also worth noting in the present context is the observation of TC I, according to which the questioning by the victims' legal representative is 'an example of the novel nature of the Statute, which is not the [exclusive] product of either the Romano Germanic or the common law legal systems.' – see Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, ICC-01/04-01/06-2127, 16 September 2009 (*Lubanga*, TC I, 16 September 2009), para. 24.

⁷⁰² *Ibid.*

possibility to engage in the examination of evidence would ensure that their participation is not merely symbolic. The intervention of victims in the examination of evidence could likewise contribute to shedding further light on certain pieces of evidence. It may as well ‘potentially enable the Chamber to better understand some of the matters at issue, given [the victims’] [...] local knowledge and social and cultural background.’⁷⁰³

Before proceeding with the analysis of the specific provisions regulating the part played by victims in the examination of evidence, it is worth recalling that due to its complexity the intervention of victims in the ICC’s evidence-gathering procedure was left outside the Statute’s purview. For that reason, the relevant norms are to be found in the Rules instead.

The central provision governing the intervention of victims in the examination of evidence is rule 91(3). This legal text allows the victims’ legal representative to engage in the questioning of witnesses, experts and the accused. This possibility, as noted at the very outset, is subject to a number of qualifications. That is to say, rule 91(3) ‘regulates the limited manner in which victims may be permitted to put questions to a witness.’⁷⁰⁴

First, the questioning by the victims’ legal representative does not take place automatically, as of right, but is contingent on an application in this regard to the Chamber. In addition, the legal representative may be required to provide a written note of the questions to be posed to the witness, expert or the accused, on which the parties will be allowed to make observations. Next, unlike the Prosecutor and the defence, the legal representatives may be required to disclose in advance their lines of questioning not only with respect to vulnerable or traumatized witnesses, but with respect to any witness in general.

In its decision whether to grant the request for intervention the Chamber, pursuant to rule 91(3)(b), is enjoined with the task to perform a balancing test contemplating the manifold interests which are at stake: the interests of the parties and of the victims together with the interests of the witness(es) concerned against the backdrop of the requirements of fairness, impartiality and expeditiousness of the proceedings. In light of all these considerations, if the Chamber grants the request of the legal representative, it may give concrete directions on the manner and order of the questions and the production

⁷⁰³ *Katanga and Ngudjolo*, TC II, 22 January 2010, para. 75, footnote omitted.

⁷⁰⁴ See the partly dissenting opinion of Judge Kirsch to the Judgment of the Appeals Chamber of 11 July 2008, para. 31, as well as the dissenting opinion of Judge Pikis to the same Judgment.

of documents in accordance with its statutory powers. The Chamber may as well decide to put itself the question(s) on behalf of the legal representative, if it considers it appropriate.

It thus follows that the Chamber, vested with primary authority and control over the proceedings, is entrusted with the task to ensure that the intervention sought by the legal representative is appropriate at the respective stage of the proceedings and that the questioning will not be performed at the expense of the fair trial rights of the parties⁷⁰⁵ or the efficient and timely dispense of justice. An acknowledgement to that effect is also reflected in practice, where it has been observed that '[t]he Chamber must take a global view for each witness, to ensure that the overall effect of the questioning by victims does not undermine the rights of the accused and his fair and impartial trial.'⁷⁰⁶ Thus, since the intervention of the victims' legal representative may have an impact on a variety of interests which are at stake in the course of the proceedings, including the interests of the person giving testimony or expert opinion, it is for the Chamber to determine the questions to be allowed and the way they will be put to the witness, expert or the accused.

Given all the above, it becomes evident that the intervention of the legal representative in the examination of evidence on the merits is subject to the scrutiny, directions and strict control of the Chamber in charge of the proceedings. Consequently, the regime set forth in rule 91(3) clearly indicates that the rationale behind the engagement of victims in the examination of evidence emanates from the overall philosophy of victims' participation, embodied succinctly in article 68(3), and discussed at length in a previous chapter.

Consistent with the statutory regime governing the involvement of victims in proceedings, rule 91(3) neither predetermines nor confines the scope and the manner of the questioning conducted by the legal representative to a particular range of issues. Accordingly, the scope of the examination of a witness, expert or an accused by the victims' legal representative is subjected entirely to the discretion of the Chamber. As already noted above, in its determination the Chamber in charge of the proceedings would have to take into consideration the specificities of the case, the precepts of fairness and

⁷⁰⁵ In the same vein, *Lubanga*, TC I, Decision on the defence observations regarding the right of the legal representatives of victims to question defence witnesses and on the notion of personal interest -and- Decision on the defence application to exclude certain representatives of victims from the Chamber during the non-public evidence of various defence witnesses, ICC-01/04-01/06-2340, 11 March 2010, para. 35, where the Chamber observed that '[t]he Chamber must take a global view for each witness, to ensure that the overall effect of the questioning by victims does not undermine the rights of the accused and his fair and impartial trial'.

⁷⁰⁶ *Ibid.*

expeditiousness, the interests of the key stakeholders in proceedings and likewise the need for a meaningful participation on the part of victims.

Logically, depending on the circumstances, the guilt of the accused may fall among the issues which the legal representative would seek to address by way of questioning a particular witness, expert or the accused upon authorisation by the Chamber. Thus, questions touching upon the individual criminal responsibility of the accused rather than being ruled out as a matter of principle, should be considered by the Chamber in light of the victims' personal interests and the due process rights of the accused.

The same line of reasoning has guided the Court throughout its jurisprudence. The first Trial Chamber to address this issue – the Chamber in *the Lubanga* case - held that it would allow appropriate questions to be put by the victims' legal representative(s) whenever the victims' personal interests are engaged by the evidence under consideration.⁷⁰⁷ Further in the same spirit, the Chamber noted that 'the victims' legal representatives may [...] question witnesses on areas relevant to the interests of the victims in order to clarify the details of their evidence and to elicit additional facts, notwithstanding its relevance to the guilt or innocence of the accused.'⁷⁰⁸ At the same time, an important emphasis has been made that the questions by the victims' legal representative(s) must be 'confined [...] to the particular issues and evidence which engage [the victims'] personal interests'.⁷⁰⁹ Trial Chamber II, on its part, has reiterated the understanding, which is equally applicable to any intervention on the part of victims in the course of the proceedings, that the questioning pursuant to rule 91(3) should not be prejudicial to or inconsistent with the rights of the accused and the precepts of a fair and impartial trial.⁷¹⁰

In the same fashion, the Appeals Chamber has found that the questions which may be put by the legal representative in accordance with rule 91(3) may pertain to the guilt or innocence of the accused as long as the victims' personal interests are affected.⁷¹¹ Although one of the dissenting Judges also opined that the questions pursuant to rule 91(3) must 'necessarily relate to the victims' personal interests that legitimise their participation', he made the apposite clarification that such questions should not relate 'to

⁷⁰⁷ *Lubanga*, TC I, 18 January 2008, para. 108.

⁷⁰⁸ *Lubanga*, TC I, 16 September 2009, para. 26.

⁷⁰⁹ *Lubanga*, TC I, 11 March 2010, para. 33.

⁷¹⁰ *Katanga and Ngudjolo*, TC II, 22 January 2010, para. 74.

⁷¹¹ *Lubanga*, Judgment of the Appeals Chamber, 11 July 2008, para. 102.

facts of which the accused was not forewarned by the disclosure of evidence on the subject'.⁷¹²

In light of the foregoing, it is logical to be inferred that the role played by victim-participants in the processing of evidence on the merits is in keeping with their non-party standing in the ICC's criminal justice process.

4. Victims' Role in the Processing of Evidence Germane to Reparations

Besides the involvement of victims in the evidence-gathering process on the merits of the case, another important issue which calls for separate consideration is the part accorded to victims in fact-finding proceedings and/or hearings on reparations. As previously noted, the possibility for victims to participate in reparation proceedings is distinct and independent from the possibility to intervene in proceedings on the merits of the criminal case. This scenario is different from the situation of civil parties before the ECCC, for instance, where the civil claim is a prerequisite for the participation of civil parties in the case.

4.1. The Essence of Reparation Proceedings in Brief

Unlike proceedings regarding the guilt or innocence of the accused, reparation proceedings concern the civil action brought by victims on the criminal justice arena. Reparation proceedings focus on the victims' request for indemnification for the damages sustained as a result of the crime(s) under consideration in the event of a conviction. Thus, while the victims' interest in the determination of the harm incurred as a result of the alleged crime(s) is an ancillary objective and only one among the manifold interests which are at stake in the proceedings adjudicating the individual criminal responsibility of the accused, it represents the principal, core subject of reparation proceedings. It thus follows that within the context of reparation proceedings the victims' interest in indemnification takes precedence over the more general interest represented by the Prosecutor in proceedings on the merits aimed at achieving justice through individual and general deterrence. Consequently, in reparation proceedings the restorative values of criminal

⁷¹² Dissenting opinion of Judge Pikis to the Judgment of the Appeals Chamber of 11 July 2008, para. 17.

justice prevail over its retributive objectives.⁷¹³ Therefore, not surprisingly, the victims' right to claim reparations has been identified as 'the most important restorative element in the Statute'.⁷¹⁴

4.2. Parties to the Reparation Proceedings

By contrast to their non-party standing in the criminal justice process, the stake of victims in an award of compensation positions them as chief players at hearings and/or proceedings limited to reparations. Victims bear the onus of proving the scope and the extent of the damage, loss and/or injury which they claim to have sustained as a result of the criminal conduct under consideration. Therefore, as duly observed, 'any element of the civil action that goes beyond the elements of the crime charged needs to be demonstrated' by the victim seeking reparation.⁷¹⁵ Hence, victims rather than the Prosecutor assume the role of principal protagonists, that is, the standing of a party in proceedings related to reparations.

The leading part of victims in reparation proceedings is largely acknowledged in the relevant literature, where it is observed that at the reparations stage victims may assume the role and function of parties⁷¹⁶ with 'the accompanying right to bring evidence'.⁷¹⁷ The same understanding is reflected in one of the dissents to the Appeals Chamber's Judgment of 11 July 2008 in the *Lubanga* case. According to the dissenting Judge, '[the] provisions concerning leading evidence relating to guilt or innocence at trial contrast with the provisions that apply to reparations. [...] The restrictions on victims questioning witnesses that apply to the legal representatives of victims at the trial do not apply to this aspect of the proceedings.'⁷¹⁸ It thus follows that the participation and the input of victims is determinative for the outcome of reparation proceedings. That is to say, unlike victims' participation in proceedings adjudicating the individual criminal responsibility of the accused, the role of victims in proceedings on reparations can be

⁷¹³ See in the same vein Mekjian and Varughese, *supra* note 9, with respect to the interrelationship between punitive and restorative justice values in the context of the ICC's proceedings.

⁷¹⁴ Bitti and Friman, *supra* note 235, p. 457.

⁷¹⁵ ECCC, Case 001, Appeal Judgment of 3 February 2012, para. 428.

⁷¹⁶ Zappalà, *supra* note 11, p.154 and p. 13, as well as Friman, *supra* note 25, p. 497.

⁷¹⁷ Friman, *supra* note 25, p. 497.

⁷¹⁸ Partly dissenting opinion of Judge Kirsch to the Appeals Chamber's Judgment of 11 July 2008.

defined as ‘dispositive’⁷¹⁹ or, in other words, as capable of influencing the outcome of such proceedings.

The ICC’s legal framework contains numerous indications of the chief role of victims and the primacy of their interests in reparation proceedings. An eloquent indication of the principal, *i.e.* party standing of victims and the primacy of their interests in reparation proceedings provides article 82(4). By affording, as of right, the possibility for the victims’ legal representative to appeal the order for reparations,⁷²⁰ this norm represents a clear-cut recognition of the victims’ leading part in reparation proceedings. It is important to note that the scenario envisioned by article 82(4) is the only instance where victims are granted an explicit and autonomous right of appeal. The ICC’s normative basis does not provide for any other similar right of appeal to victim-participants with respect to the judicial findings on the merits of the case or the sentence.⁷²¹

Another inference about the primary role of victims in proceedings on reparations ensues from article 75(3). This legal text outlines the importance of the representations from or on behalf of the victims which the Chamber must consider before proceeding with an order for reparations. In the same vein, article 75(6) places a special emphasis on the interests of victims in reparation proceedings by ruling out any interpretations of the regime governing reparations to the prejudice of victims. Rule 97(3), for its part, postulates as a guiding principle within the context of the assessment of reparations that the Chamber should equally respect the rights of victims and of the convicted person.

The fact that, in the event of a conviction, an order for reparations could be made against the convicted person outlines the latter (and, accordingly, the defence) as the other principal actor in reparation proceedings. This rationale permeates the provisions of article 75(2) and article 76(3) read in conjunction with article 76(1) which expressly conditions the submission of representations concerning reparations upon a conviction. Consequently, the relevant legal framework identifies the convicted person as the person

⁷¹⁹ Edwards, *supra* note 448, p. 974. The author identifies the ‘dispositive’ type of victim participation as a participation, according to which, victims have control over a particular decision.

⁷²⁰ By contrast, as previously noted, victims do not have the right to appeal decisions of acquittal, conviction or sentence – *see* article 81.

⁷²¹ Article 81. Further on the right to appeal and the interrelation between the right to appeal and a person’s party standing in proceedings *see* the analysis suggested by Boyle, *supra* note 221, where the author observes that the right to appeal decisions of the Trial Chamber is a confirmation (implicit) of the victims’/civil parties’ status as full parties in trials.

against whom the Court may make an order for reparations. Respectively, the convicted person is the party which endeavours to refute the victims' claim(s) for reparations.

The diverse nature of reparation proceedings and the different standing of victims therein find reflection in the more recent jurisprudence of the Appeals Chamber in the *Lubanga* case.⁷²² Upon a juxtaposition between the lack of a right of victims to appeal a conviction and sentence and their explicit right to appeal an order for reparations the Chamber concluded that the victims are 'parties to the [reparation] proceedings and not, as is the case at other stages of the proceedings, participants who, under article 68 (3) of the Statute, may present their views and concerns where their personal interests are affected.'⁷²³ At the same time, the Chamber observed that the Prosecutor is not a party to the appellate proceedings on reparations. For that reason the prosecuting authority was not invited to submit a response to the documents in support of the appeals.⁷²⁴

The same understanding has been advanced in the jurisprudence of the ECCC. The tribunal has ruled that the Prosecutor 'has no interest in individual civil claims, [thus] may normally not intervene in a civil action which is based on adversarial proceedings between the [c]ivil [p]arties and the [a]ccused'.⁷²⁵ Hence, pursuant to these judicial findings the Co-Prosecutors have no role in seeking reparation.⁷²⁶

The acknowledgement made by each of the two judicial institutions of the distinct standing of victims and of the Prosecutor within the context of reparation proceedings as opposed to proceedings adjudicating the alleged criminal conduct adheres to the essence of reparation proceedings, as well as to the guiding principles lying at the heart of the respective legal framework. By contrast, the first ICC Chamber to address reparations-related issues – the Trial Chamber in the *Lubanga* case – neglected the fact that the Prosecutor, unlike the victims, is not a party to the reparation proceedings. As a consequence, in the Chamber's scheduling order both the Prosecutor and the defence together with the victims were invited to file submissions on the principles to be applied by the Chamber with regard to reparations.⁷²⁷ Furthermore, the prosecuting authority, on

⁷²² Being the first case to go to trial and to be concluded with an adjudication of the guilt of the accused, the *Lubanga* case logically provided the first occasion for the Court to address the issue of reparations.

⁷²³ *Lubanga*, Decision of the Appeals Chamber of 14 December 2012, para. 67.

⁷²⁴ *Ibid.*, para. 74.

⁷²⁵ ECCC, Case 001, Trial Chamber Decision of 9 October 2009, para. 23.

⁷²⁶ *Ibid.*, para. 42.

⁷²⁷ *Lubanga*, TC I, Scheduling order concerning timetable for sentencing and reparations, 14 March 2012, para. 8.

an equal footing with the victims and the defence, was requested by the Chamber to state whether it would seek to call expert evidence in the proceedings on reparations. This approach runs afoul of the normative basis on reparations, as well as of the overall nature and core purpose of reparation proceedings which leave the Prosecutor outside the purview of reparations. The perusal of the reparations-related provisions in the ICC's constitutive instruments lends support to the conclusion that the prosecuting authority has no say on matters, such as the production or the examination of evidence relevant to reparations, or the outcome of reparation proceedings.⁷²⁸

4.3. The Role of the Victims in the Evidence-Gathering Process Related to Reparations

The specificities of reparation proceedings as compared to proceedings on the merits warrant the different legislative approach as regards the substance, scope and extent of victims' intervention in the processing of evidence germane to reparations. Within the context of reparations-related issues victims are afforded an active and enhanced involvement in the processing of evidence, both in terms of its production and examination.

In the context of the production and the processing of evidence relevant to reparations, victims are explicitly entitled to submit evidence for the purpose of substantiating the information provided in their claims for reparations. Illustrative in this regard is article 94(1)(g), according to which victims are required to provide in their requests for reparations supporting documentation, including identifying information of witnesses, to the extent possible. Furthermore, with respect to the assessment of reparations victims and their legal representative(s) are entitled by virtue of rule 97(2) to request the appointment of appropriate experts to assist the Court in determining the scope and the extent of the relevant harm.

The same holds true as regards the entitlement of victims to engage in the examination of evidence related to reparations. By contrast to proceedings on the merits, the intervention of the legal representative in the examination of evidence concerning

⁷²⁸ See, more specifically, rule 97 which does not envisage the Prosecutor within its purview. Consequently, the Prosecutor is not afforded the right to call expert evidence related to the assessment of the damages sustained by victims. It thus follows that pursuant to the applicable legal framework the Prosecutor is not afforded a possibility to call expert evidence concerning the assessment of reparations.

reparation issues is conditioned solely on permission by the Chamber in charge. Unlike questioning in proceedings related to the individual criminal responsibility of the accused, in reparation proceedings the legal representative is neither required to make a formal application to the Chamber nor to provide a written note of the questions to be put to the witness, expert or the accused. It is therefore to be concluded that in reparation proceedings victims are afforded greater latitude from the Chamber's directions and control than in proceedings concerning the guilt or innocence of the accused. This line of reasoning stems from the perusal of rule 91(4), according to which, when the legal representative seeks to intervene on evidence confined to reparations the restrictions of rule 91(3)(a) and (b) do not apply. The only stipulation is that the questioning of witnesses, experts and the accused by the legal representative should take place upon permission of the Chamber.⁷²⁹

All of the above is an articulate reflection of the leading and autonomous part accorded to victims in the processing of evidence relevant to reparations. The right to actively engage in the fact-finding procedure concerning reparation claims entails that the intervention of victims in reparation proceedings has a bearing on the substance, the completeness, as well as on the quantity of the evidentiary material. Consequently, the participation of victims in proceedings on reparations directly impacts the outcome of reparation claims. It is, therefore, to be concluded that, by contrast to the 'non-dispositive',⁷³⁰ *i.e.* non-determinative role in proceedings adjudicating the individual criminal responsibility of the alleged offender(s), victims assume central, thus, determinative role in proceedings concerning reparations.

⁷²⁹ The perusal of rule 91 discerns an inconsistency between the numerical and the literal reference of rule 91(4) to the restrictions on questioning by the legal representative. According to rule 91(4), for a hearing limited to reparations, 'the restrictions on questioning by the legal representative set forth in sub-rule 2 shall not apply.' However, as has been previously discussed, the said limitations, to which rule 91(4) refers, are spelled out in sub-rule 3 instead. The drafting history of the Rules suggests that the inconsistency between the numerical and literal reference of rule 91(4) is due to the fact that sub-paragraph 1 was adopted and introduced into the provision of rule 91 subsequently, in later negotiations, following the creation of the rest of the sub-paragraphs. *See* in the same vein, Mekjian and Varughese, *supra* note 9, p. 26.

⁷³⁰ Edwards, *supra* note 448.

CONCLUDING REMARKS

The place of victims before the International Criminal Court and their role in the proceedings proves to be a multifaceted and thought-provoking issue. The thesis has aimed at unravelling some of the core features that characterize victims as independent stakeholders accorded a *sui generis* standing in the multilayered design of the ICC, different from the Prosecutor and the defence, as well as from other participants. Although this new legal phenomenon has been hailed as a laudable development at the international criminal justice scene, it is to be borne in mind that ‘every good and perfect thing carries within it the seeds of its destruction through an excess of its virtue’.⁷³¹ Accordingly, the research has striven to provide a balanced and an objective insight into the place and the part assigned to victims at the ICC from the viewpoint of an impartial observer.

As reiterated on a number of occasions, the Court bears the onerous and momentous task to properly construe the will of the drafters in balancing the restorative with the retributive objectives lying at the heart of the ICC’s system. The thesis has repeatedly emphasized the strive of the Court’s founders to ensure that the role of victims as autonomous protagonists would not take place at the expense of the fairness, impartiality, efficiency and expeditiousness of the proceedings. In deciphering the safeguards for a proper equilibrium in that respect, the thesis has considered the substance and the limitations of the part accorded to victims in view of the overarching criminal justice imperatives, the mission pursued by the parties at trial, as well as in light of the context and object of the proceedings at hand.

The exhaustive dissection of the place of victims and their role in the Court’s fact-finding mechanism equally necessitates a parallel with the legal regime and practice of other jurisdictions. The comparative glance at the domestic and supranational levels affords a broader view of the prevailing ideas, standards and trends in the field of victim-related issues and in the area of evidence law, including on a larger scale going beyond the criminal justice horizon. Viewed comparatively, it becomes evident that the legal framework, the proof-gathering style and the model of victims’ participation at the ICC are imbued with universal ideas and precepts lying at the heart of modern criminal justice.

⁷³¹ Steven J. Twist, ‘The Crime Victims’ Rights Amendment and Two Good and Perfect Things’, *Utah Law Review* (1999), pp. 369-382.

The context-specific interpretation of the standing and the role allotted to victims by the Court's founding documents is a guiding idea permeating the thesis. With respect to the interpretation of the victim eligibility criteria, for instance, while the recognition of deceased persons as victims for the purpose of participation pursuant to article 68(3) has been highlighted as questionable, it has been posited that deceased individuals fall within the purview of rule 85(a) for the purpose of reparation proceedings. Consequently, the eligibility criteria for victim status should be assessed in a creative way reflecting the specificities and the purpose of the proceedings at which admission is sought. The context-specific interpretation of the victim definition is also exigent with respect to the requirement for a causal nexus between the alleged harm and the purported crime(s) under consideration. As previously noted, the accurate interpretation of the causal link eligibility criterion has a direct bearing on the scope of potential victim-participants. Bearing in mind the growing number of victim-applicants, the correct elucidation of the causal link criterion thus proves essential for the efficient functioning of the Court as a whole.

As the ICC gains momentum, the overwhelming number of victim-participants comes to no surprise. It is a logical corollary of the enhanced awareness about the Court's unique mandate with respect to victims. Still, developments of the kind necessitate reassessment and adaptation of some of the initial ideas enunciated in the ICC's normative basis. In particular, reconsideration of the manner of employment of certain rights accorded to victims proves indispensable in order to meet the exigencies of the complex realities of trials of mass atrocities taking place before the first permanent international criminal jurisdiction.

For that purpose, as posited in the course of the discussion of the rights of victims within the ICC's system, certain rights, such as the right to participation for the purpose of presenting views and concerns, should be exercised predominantly in an indirect way, through the victims' legal representative(s). Given the realities of the ICC's proceedings to date, participation *via* a legal representative would ensure that the right pursuant to article 68(3) is employed without prejudice to the proper conduct of the trial or to the precepts of due process, efficiency and expeditiousness. Viewed from a comparative perspective, this conclusion finds solid grounds in the recent jurisprudence of both the STL and the ECCC which attests to a steadfast drift away from participation in person due to analogous considerations.

At this point, it is to be recalled that the assessment of whether the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial comes into play only after the positive determination by the Chamber in charge of the proceedings that the victims' personal interests are affected by the proceedings at stake, as well as that the stage at which the intervention is sought is appropriate. The divergent jurisprudence on the prerequisites of article 68(3) bears witness to the fact that the proper illumination of the fundamental provision on victims' participation has posed a challenge to the Chambers, especially at the inception of the Court. The analysis of the conflicting views lends support to the conclusion that the accurate interpretation of the criteria pursuant to article 68(3) necessitates a case-specific, contextual approach taking into consideration the idiosyncrasy of the extant proceedings. As the research has endeavoured to show, the opposite approach favouring the predetermination of the personal interests of victims as being *per se* and in general affected by the proceedings and the uniform introduction of 'sets of procedural rights' to which victims would be entitled throughout the criminal process, run afoul of the intentions of the drafters. The uniform predetermination of the prerequisites for victims' intervention would render their participation automatic, *i.e.* as of right, thus, would leave article 68(3) devoid of substance. As a consequence, such an approach would blur the distinction between the standing of a victim and the standing of a party to the proceedings and would entail, accordingly, inimical implications on the efficient and fair conduct of the judicial process as a whole.

Besides the arguments advanced hitherto, an endorsement of the context-specific approach ensues from the parallel between the victims' participation model at the ICC and the procedural phenomenon of 'intervention of interested persons' in ongoing litigation, known in national and international proceedings alike.⁷³² Just like the right of victims to intervene pursuant to article 68(3), the employment of the litigation rights of an intervener is contingent on the case-by-case assessment of the Chamber concerned whether the prospective intervener has a sufficient stake in the outcome of the case, the adequacy of representation of his or her legitimate interests and the prejudice, if any, to the parties if intervention is allowed.

⁷³² See in this respect article 62 of the ICJ's Statute.

The fact that, unlike the Prosecutor and the defence, the right of victims to take part in proceedings is not automatic, but is contingent on a number of prerequisites set forth in article 68(3), is an eloquent indication of their distinct non-party standing in proceedings on the merits of the criminal case. At the same time, the possibility of victims, albeit conditional, to intervene in the ICC's process upon their own initiative and in their own right, is an essential distinguishing feature between victim-participants and other participants, such as witnesses.

By contrast to persons with victim standing, the participation of witnesses is confined to their appearance as information-providers to the extent to which their testimony is deemed necessary by the criminal justice authorities for the elucidation of the subject-matter at hand. Thus, witnesses do not take part in proceedings of their own accord, but solely as long as they are summoned to testify. Furthermore, the participation of witnesses is exhausted once they provide their account of the facts relevant to the case. Hence, the part played by witnesses does not go beyond the role of mere 'evidentiary fodders',⁷³³ which renders their participation in proceedings short-lived and incidental.

Notwithstanding the above, as evidenced by the thesis, instances may arise whereby a person taking part in proceedings as a victim could also appear as a witness in the one and the same case. This scenario entails the combination between the standing of victim with the capacity of a witness, referred to as 'duality of status'. The research has suggested a comprehensive and innovative insight into the procedural phenomenon of dual victim-witness status from a comparative perspective against the backdrop of universal evidentiary concepts and principles regarding relevance, admissibility, and probative value of evidence (i.e. credibility and reliability), completeness of the evidentiary material (that is, necessity, sufficiency and surplus of evidence). The analysis has discussed at length the different scenarios of acquiring duality of status and has suggested intriguing juxtapositions between the procedural nature and substance of victims' applications for participation and witness statements, as well as between the procedural nature of victims' views and concerns and of witness testimony. Attention has also been drawn to the highly complex issue regarding the impact of an inconsistent testimony provided by a dual status individual on that person's victim standing and the consequences of a withdrawal of victim standing. Given the lack of a serious

⁷³³ Edwards, *supra* note 448, p. 976.

consideration in the relevant literature to date, the thesis has endeavoured to fully encompass and to contemplate as meticulously as possible the manifold thought-provoking issues that duality of status brings to the fore.

The discussion of the *sui generis* standing of victims in the ICC's proceedings would not be exhaustive without an analysis of their role in the Court's fact-finding procedure. In fact, besides the conditional character of the victims' right to intervene in proceedings pursuant to the general participation scheme of article 68(3), the place of victims in the ICC's evidentiary procedure on the merits of the criminal case is another salient characteristic of the victims' independent yet non-party standing. The analysis of the part accorded to victims in the fact-finding procedure entails, by implication, a juxtaposition with the corresponding role played by the parties in that respect. Therefore, in order to properly delimit the role of victim-participants in the evidentiary process, a discussion of the ICC's fact-finding mechanism, as well as of the rights of the parties and the powers of the Chamber pursuant to article 69(3) is indispensable.

As the present study has shown, the latter provision is an excellent example of the blending of legal ideas characteristic of the two traditional criminal justice paradigms existing in a domestic setting,⁷³⁴ since it accommodates features of both the common law and the continental models of developing evidence. This mixed nature of the ICC's proof-gathering style presupposes an active involvement in the evidence-gathering process of the parties, as well as of the Chamber, when the latter deems it necessary for the establishment of the truth.

By contrast, as attested by the perusal of the Court's constitutive documents, the Rome Statute is silent on the involvement of victims in the processing of evidence, both in terms of the submission and the examination of material. Although this silence has been partially remedied in the Rules through the stipulation of the conditional possibility for victims to intervene in the examination of evidence *via* their legal representative(s), still, the ICC's normative basis does not provide an answer to the question whether victims could impact the scope and substance of the evidence by way of placing material before the Chamber. Heedful of the inability of the drafters to agree on the possibility of victims to engage in the presentation of evidence on the merits of the criminal case, careful consideration has been given to the ways in which victims could contribute to the

⁷³⁴ See the juxtaposition suggested by Damaska, *supra* note 501.

evidentiary material without, however, assuming an active role in the submission of evidence. The research has contemplated the possibility of victims to bring to the attention of the Chamber in the course of the presentation of their views and concerns relevant information beneficial to the ascertainment of the truth with a bearing on their personal interests. By drawing the attention of the Chamber to pieces of evidence victims could substantiate assertions advanced in their views and concerns which would ensure that their participation is meaningful rather than purely symbolic. Such course of action would not contradict the will of the Court's founders due to the fact that the ultimate decision whether such information should be incorporated into the evidentiary material would rest with the Chamber.

The rationale behind the role of victims in the evidentiary process germane to reparations, as the present study shows, is rather different. Victims are endowed with a greater leeway in the processing of evidence related to reparations which is a logical corollary of the subject-matter of proceedings adjudicating claims for reparations. The latter focuses on the nature and the extent of the alleged harm sustained by victims as a result of the commission of the crime(s) under consideration – a feature that entails the victims' party standing in reparation proceedings.

In view of the foregoing, the overall conclusion to be advanced is that depending on the subject-matter and the purpose of the proceedings at hand victims at the ICC may assume a part that does not affect outcomes directly (as non-party participants with limited intervention in the evidentiary process - in proceedings on the merits of the criminal case), as well as a part that impacts outcomes directly (as parties with central role in the evidentiary process - in reparation proceedings). Consequently, the standing of victims in the Court's multilayered design and their role in proceedings ensue from the purpose of their participation as enunciated by the Court's legal framework. The latter is, indubitably, intrinsically linked to the objective and the subject-matter of the proceedings at hand.

ANNEX I

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ANNEX II

LIST OF CASES AND JURISPRUDENCE

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I. Situation in the *Democratic Republic of Congo*, ICC-01/04

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b) Appeals Chamber

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a) Pre-Trial Chamber I

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b) Appeals Chamber

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Decision on various issues related to witnesses' testimony during trial, ICC-01/04-01/06-1140, 29 January 2008

Decision on the Prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses, ICC-01/04-01/06-1372, 3 June 2008

Decision on certain practicalities regarding individuals who have the dual status of witness and victim, ICC-01/04-01/06-1379, 5 June 2008

Decision on the applications by victims to participate in the proceedings, ICC-01/04-01/06-1556, 15 December 2008

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Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, ICC-01/04-01/06-2032, 9 July 2009

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Judgments:

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1.3. Appeals stage

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Decision on Victims' Applications for Participation, ICC-02/04-172, 21 November 2008

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b) Appeals Chamber

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IV. Situation in *Darfur, Sudan*, ICC-02/05

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b) Appeals Chamber

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